

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT AND
JOINT APPENDIX**

858

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

*United States Court of Appeals
for the District of Columbia
Circuit*

FILED SEP 27 1948

No. 9881

Joseph W. Stewart

~~CLERK~~ HENRY S. ROBINSON, *Appellant*,

v.

RUSSELL J. CARROLL, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 9881.

HENRY S. ROBINSON, *Appellant*

v.

RUSSELL J. CARROLL, *Appellee*

Appeal from the District Court of the United States
for the District of Columbia

BRIEF FOR THE APPELLANT.

JURISDICTIONAL STATEMENT

Appellee, who was plaintiff below, filed his complaint seeking a money judgment against defendant on a contract claiming that defendant purchased certain Marine engines from the United States Maritime Commission as a result of information given to the appellant by appellee and for which appellant agreed to pay appellee five per cent of the net purchase price for all such engines bought from the United States Maritime Commission. The complaint

alleged that certain engines were so purchased through appellee's efforts and that commissions of \$20,162.50 were due appellee. Defendant answered, denying any such contract as alleged and asserted no engines were purchased through the efforts or information of appellee.

The lower court had jurisdiction by virtue of Title 11, Sec. 301, and this Court has jurisdiction by virtue of Title 17; Sec. 101 of the District of Columbia Code, 1940.

STATEMENT OF THE CASE

For convenience, the parties will be described as they appeared in the Lower Court.

Russell J. Carroll, plaintiff, sued the defendant, Henry S. Robinson and James P. Nolen, on an alleged contract agreed to between the plaintiff and defendants whereby plaintiff was to get information from the United States Maritime Commission as to the availability, price and quantity of Continental, Superior and Atlas Imperial engines. Plaintiff was to be paid five per cent of the net purchase price of any such engines purchased by the defendants from the Commission through his efforts (Jt. App. 6, 13, 14).

Defendant James P. Nolen was not served with process and was not before the Court as a defendant (Jt. App. 7).

Plaintiff claimed that the defendant Robinson made a contract purchase of 125 Continental engines, 20 Superior engines, 12 Atlas engines and 6 Superior engines, Model SMR #4, and that the defendant refused to pay the alleged five per cent commission amounting to \$20,162.50.

The contract relied upon by plaintiff was simply to procure information and to "intercede" on behalf of defendant with the Maritime Commission so that defendant could be informed of what engines were available, the price, the location, quantity, quality, etc. He was not an agent of the defendant and had nothing to do with the actual purchase of the equipment (Jt. App. 38, 41, 42, 50, 59).

The case was presented by both sides before a jury, and after hearing witnesses, both of plaintiff and defendant, the

Court directed a verdict for plaintiff for the amount demanded in the Complaint (Jt. App. 8, 103).

STATEMENT OF POINTS

The Court erred in taking the case away from the jury and directing a verdict for the plaintiff when:

1. (a) The only evidence supporting the alleged contract and its performance came from the mouth of the plaintiff who was an interested party, since the credibility of the testimony of such a witness presents a question of fact for the jury.
(b) The testimony of the witnesses for both parties as to performance of the contract was inconsistent and contradictory to that of the plaintiff, and the question of performance was therefore a question for the jury.
2. The Court erred in permitting the introduction of evidence prejudicial to defendant's case.
3. The Court was prejudiced by the fact that because neither defendant appeared, there was no defense available to them.
4. Carroll's contract was void and unenforceable on grounds of public policy because the compensation was contingent on procuring a sale of surplus war materials from the Government to Robinson.
5. The Trial Court should have submitted question to the jury as to whether or not Carroll's contract by its very terms contemplated the use of lawful and legitimate acts as a broker in securing the sale of War Surplus materials to defendants, or whether from the testimony of Carroll, the nature of Carroll's contract was to promote the use of Carroll's influence with Government officials in an endeavor to secure the sale of surplus materials to the defendants.

6. Assuming that Carrol had a valid broker's contract, then it was incumbent upon Carroll to show that he was the procuring cause of the sale.
7. Plaintiff Carroll was never authorized to practice before the Maritime Commission under the Rules and Regulations governing practice before that Commission.

SUMMARY OF ARGUMENT

By an alleged contract entered into with defendants, the plaintiff claimed the sum of \$20,160 by reason of obtaining information from certain officials of the Maritime Commission on the availability for purchase of certain Marine engines. After having received information on the price, quality, quantity and location of the machines he was to relay this information to defendants and if they purchased these engines, plaintiff was to receive five per cent of the net purchase price.

The plaintiff was the only witness who testified to the existence of such a contract. The plaintiff was an interested party and the question of his credibility, even though his testimony remained unimpeached, presented a question of fact for the jury.

In order to recover on his contract, it became necessary for the plaintiff to prove that he had actually performed, i. e., that he did in fact get certain information from the officials of the Maritime Commission. He claimed that he got this information from Messrs. Clark and Gorman, officials of the Maritime Commission. Clark, for the defendant, and Gorman, for the plaintiff, testified that he got no information from them. The question of performance, therefore, was one for the jury, and not the Court, particularly considering that the evidence on these matters of fact of all witnesses was so conflicting that reasonable men might well have differed upon all the evidence. By reason of these discrepancies, the jury might not have placed any

credibility on plaintiff's testimony in regard to the execution of the contract or its performance.

The Court permitted counsel for plaintiff to introduce pictures of plaintiff in a newspaper, together with an account of his activity as an engineer of a shipyard on the West Coast (Jt. App. 35, 36; Ex. 3, 4, 5). This was prejudicial to defendant's case, as his character or reputation were not in issue. By permitting the evidence, the Court should have allowed the defendant an opportunity to introduce evidence showing his standing with the officials with the Maritime Commission, which the Court disallowed (Jt. App. 97-98).

It may be seen from the various statements of the Court below that the Court was prejudiced against defendants by reason of their absence at the trial and their failure to testify. Any inferences to be drawn by failure of defendants to appear and testify should have been drawn by the jury and not the Court, and it was error for the Court to comment on their failure to testify.

Carroll's contract on its face was void and unenforceable in a court because it was contrary to public policy. Carroll's contract provided for the procuring of a public contract on a contingent compensation. The courts have long declared such contracts contrary to public policy and unenforceable, because they are based on contingent compensation and have a tendency to promote and produce sinister and evil influence on Government officials and department heads. The Supreme Court has likened them in the *Tool v. Norris* case, 2 Wall 45, 17 L. Ed. 868, to "lobbying" contracts securing the passage of legislation. The Lower Court should have granted the motion for summary judgment or motion for judgment on the pleadings and the Trial Court should have *sua sponte* directed a verdict for the defendants on the testimony of Carroll as to the nature and kind of his contract for employment. The Trial Court should have submitted the question to the jury for the jury to pass upon the ques-

tion as to whether or not the terms of Carroll's contract did not call for Carroll to use illegitimate means and illegal methods of personal influence on department heads in an effort to secure the sale of war surplus materials to the defendants or whether or not Carroll's contract called for legitimate and lawful means of persuasion and approach of inducing legitimately the sale of Government war surplus.

Assuming arguendo that the contract was legal and enforceable, Carroll did not give evidence of performance nor did he support the rule of procuring cause that he brought about the sale of the surplus property to the defendants. The rules of the Maritime Commission require an individual who is not an attorney and who desires to practice before that Commission to have a license of authorization from that Commission to practice before it. Carroll had no such authority and the records of the Commission show that no authorization to practice at any time has been given to the plaintiff Carroll, and his conduct of employment before that Commission is therefore illegal and unenforceable.

The Commission also requires that where a contract is based on a contingent fee for services to be rendered before the Commission, such a contract should be filed with the Commission. Since Carroll operated without authority to practice before the Commission and did not file his contingent fee contract with the Commission, he is precluded from maintaining an action at law because he was not authorized to practice before that Commission and his contract of employment is contrary to the regulations issued under the statute setting up the Maritime Commission.

ARGUMENT

Point I.

There was no corroboration of Plaintiff's testimony that contract was made, and, therefore, the credibility of his testimony was for jury.

Plaintiff, Carroll, testified that after having been introduced to the defendants over the telephone by a certain John Light, arrangements were made to see defendants in the Roosevelt Hotel that same night (Jt. App. 12). Defendant Nolen, according to plaintiff's testimony, asked him to "work out a deal or give him information when he could get a wholesale price on these engines by taking a large number to be shipped for export" (Jt. App. 13). Plaintiff was to get information on what equipment was available from surplus agencies, and plaintiff testified that defendants agreed to pay him five per cent of the purchase price of any equipment purchased as a result of this information furnished.

The question of a written contract came up during this conference, and plaintiff said: "If I am dealing with you two individuals, we need no contract other than our verbal contract with all of us together." There was no other testimony other than plaintiff's, on the alleged making of this verbal contract (Jt. App. 15).

Under the circumstances the Court should have submitted the question of plaintiff's credibility on the making of the contract to the jury. The plaintiff was an interested party to the tune of \$20,160.00. He stood to lose or gain that amount on his testimony alone, as far as the making of the contract was concerned. Considering the glaring discrepancies in his testimony with that of other witnesses, as shown in another part of this brief, the jury could have disbelieved his entire testimony on the making of the contract. The jury could have and should have been allowed to consider the question as to why the contract had not been reduced to writing, particularly in view

of the large amount claimed by the plaintiff. It may be assumed from the record, and the jury had a right therefore to assume that the plaintiff could have had his contract reduced to writing had he so desired; but he was content to work without a written contract. The jury further, in viewing all of the testimony in the case, could have and should have been allowed by the Court to consider the unusual type of contract which the plaintiff would have us believe two intelligent businessmen entered into. He was to give to defendants "solely information" which the record clearly shows was already available to not only the defendants but to any other person who desired it as quickly and as easily as plaintiff could have gotten the information. (Jt. App. 42-87, See Clark testimony)

In *Sonnentheil v. Moerlein Brewing Co.*, 172 U. S. 401; 43 L. Ed. 492; 14 S. Ct. 223, the Court said:

"They (witnesses) were all apparently interested in sustaining the deed, and in denying all knowledge of a fraudulent intent, and while the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses (citing cases) the very courts that lay down this rule qualify it by saying the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." (Citing cases) See *Volkman v. Manhattan R. Co.*, 134 N. Y. 418; 31 N. E. 879; 30 Am. St. 678.

As will appear hereafter, the testimony of other witnesses does not support the theory of plaintiff's case so that his testimony was not as a fact "uncontradicted", but even if it had been, appellant submits that the question of the existence of the contract was one for the jury.

In this regard, the Court said this in *McNight v. Parsons*, 136 Iowa 397; 113 N. W. 858; 125 Am. St. Rep. 265:

"The testimony of the cashier of the bank that he or the bank purchased the note for value before maturity even though he be not disputed by any other

witnesses to the transaction is not necessarily sufficient to enable the Court to say as a matter of law that he received it in good faith. Such evidence does not negative notice or knowledge on part of other officers of the bank. Moreover, the bank being an interested party, the credibility of the testimony of the cashier was a matter for the jury to pass upon in the light of all the facts and circumstances surrounding the matter under inquiry". (Citing cases)

See also: *Skellem v. Baker*, 82 Ark. 86; 118 Am. St. Rep. 52; 100 S. W. 764; *Schmidt v. Marconi*, 86 N. J. L. 183; 90 Atl. 1017; *Munoz v. Wilson*, 111 N. Y. 295; 18 N. E. 855; *Robinson v. Zappas*, 227 App. Div. 208; 237 N. Y. S. 235.

Evidence showed that Plaintiff did not perform contract.

In order for the plaintiff to recover the amount claimed, it was necessary to prove that the contract was not only made but that he actually performed his part of the contract. Appellant submits that Mr. Gorman, assistant director, Maritime Commission, a witness for the plaintiff, and Mr. Clark, Sales Manager, Maritime Commission, a witness for the defendant, completely refutes any testimony of the plaintiff that plaintiff obtained any information from these two officers of the Maritime Commission.

Plaintiff had testified that he made the contract with the defendants on February 20, 1945 (Jt. App. 11-12). On the next day (Feb. 21), he testified that he went to the Maritime Commission and talked to Mr. Gorman and Mr. Clark (J. App. 15). He told them (Clark and Gorman) that he was interested in purchasing a large number of engines for export for a client (J. App. 16) and that he went "over the list, figured the price on them (engines) and asked if there was any additional stuff that they knew of that was coming up where he could get a large volume of engines at one time." (Jt. App. 16). This conversation took place on February 21, 1945 according to plaintiff's testimony but Mr. Gorman testified that plaintiff never saw him about this transaction on February 21, but that he saw him a month before the deal was finally completed with

the Maritime Commission by the defendants, placing the time about a month prior to June 10, 1945 (Jt. App. 74). Gorman did not see plaintiff until some time in May 1945. He did not see plaintiff in regard to these engines in February, March or April, 1945 (Jt. App. 74).

Mr. Clark, general sales manager for the Commission testified that plaintiff did not talk to him about the engines in question until after the deal had been made by the Commission with the defendants about June 10, 1945 (Jt. App. 85).

A further contradiction, on this important issue, was made to the plaintiff's testimony by both Gorman and Clark. The gist of all the testimony of the plaintiff was that he was receiving "first handed information" (Jt. App. 43) from Gorman and Clark during the months preceding the deal of the defendants with the Commission. Plaintiff testified that he talked with Clark "from eight to twelve times about these particular engines" (Jt. App. 47) in Clark's office.

Gorman testified that he had no information to give plaintiff, as such would be forthcoming from Mr. Clark (Jt. App. 75). Clark testified that plaintiff did not talk about these various engines with him until defendants had completed their deal at the Commission (Jt. App. 85). Clark testified that plaintiff did talk generally with him about all manner of equipment (Jt. App. 85) but that he still continued to do so until Clark left the department in October 1946 (Jt. App. 85), long after the defendants' deal with the Commission had been consummated.

Plaintiff testified that he identified his clients (Nolen and Robinson) to Clark and Gorman on the first day he talked to those officials (Jt. App. 16). Gorman had no recollection that plaintiff had identified his clients (Jt. App. 74). Clark testified that between February and June, 1945, plaintiff said nothing of Nolen and Robinson (Jt. App. 83) but that plaintiff identified himself as being interested in the equipment personally for "Russell Carroll Associates" (Jt. App. 83).

Plaintiff had testified that he had talked to Gorman and Clark in reference to reducing certain Continental engines from the wholesale list price of \$910 each to \$750 if Nolen and Robinson were to purchase a large volume of these engines (Jt. App. 57). Mr. Gorman testified unequivocally that he never discussed the reduction of price with plaintiff (Jt. App. 76). Clark did the same (Jt. App. 86), stating that the defendants themselves made the arrangements for the reduction.

Plaintiff further testified that he talked to Mr. Clark about June 19, 1945 and requested of Clark that Robinson, defendant, be permitted to inspect the Continental engines at Mechanicsburg, Pennsylvania, after Robinson had talked over the phone with plaintiff. Clark, however, said that Robinson had called him direct from New York to request inspection and that Carroll had nothing to do with the request (Jt. App. 87). As a matter of fact, as far as Clark was concerned, plaintiff "was not in the deal until it was consummated, as far as Robinson and Nolen were concerned." (Jt. App. 88)

Finally Clark testified that all persons were treated alike as far as opportunity to purchase the equipment was concerned (Jt. App. 87), and that he had ordered the defendants' names placed on the mailing list (Jt. App. 86) and the first time he talked with Nolen, he (Nolen) had a copy of the latest publication of the Commission on the engines (Jt. App. 83).

During the period in question (February 21 to June 25), the plaintiff testified that he had made numerous long distance telephone calls to Robinson in reference to these particular engines (Jt. App. 21, 22). He also sent "pencil notes" in the mail to Robinson, giving him information as to the machines (Jt. App. 22). The plaintiff had an office in the Investment Building, but these "pencil notes" were not sent from his office, but from his apartment (Jt. App. 52). Most of the long distance calls were made from his apartment (Jt. App. 55).

No bills from the telephone company for the long distance calls were produced by the plaintiff, and, of course, no copies of the "pencil notes" were available (Jt. App. 21, 22).

Accordingly, it is rather amazing that no written record of any kind was made by the plaintiff from the time of the alleged making of the contract until about the time the deal was about to be consummated by the defendants with the Maritime Commission (Jt. App. 21-22, 52, 53).

At a time, therefore, when the deal of the defendants with the Commission was imminent, the plaintiff then wrote to defendant Robinson, a formal letter, keeping a carbon copy, setting forth what the agreement between the parties was, as he, the plaintiff, understood it. (Jt. App. 31-32, 52, 102, 104, 105, 106).

It is submitted that the defendant had a right to have the jury determine under all the circumstances whether the plaintiff actually had an agreement with defendants, and, if he did, whether he actually performed it.

The jury, as reasonable men, would have resolved the issue in favor of the defendants, from the sheer lack of evidence on the part of the plaintiff. It is a matter of common knowledge that long distance telephone calls are billed separately, showing the amount for the call and the city called and the date of the call. If the plaintiff had been the least bit diligent, he could have obtained these slips prior to trial, particularly when he was asked in his deposition to obtain them.

The jury, as reasonable men, could further have reached the determination that in a contract involving \$22,000, an intelligent businessman, with an office in a large and well-known building in the city, would have had some record or memorandum either showing the making of the contract or some of his activities in performing it. They might have agreed that sending penciled notes in regard to a contract involving the purchase of nearly one-half million dollars worth of equipment was unusual, coupled with the

fact that when the defendants actually were about to buy the machines from the Maritime Commission, the plaintiff thereupon sets forth a lengthy self-serving declaration in the form of a letter, stating what he considered the contract to be and what he had done in performing it. The jury could rightfully have questioned the credibility of the statement contained in the first paragraph of that letter when plaintiff stated that he had submitted a price of \$750.00 per Continental engine, when his own witness (Gorman) contradicts him, and the witness for defendant (Clark) does likewise.

In order for plaintiff to perform his contract properly, therefore it is elementary to point out that he had to secure his information from some person before he passed it on to defendants. Plaintiff said he got the information from Gorman and Clark, while these two men said that he did not. The jury, had it been allowed to do so, could have properly inferred that plaintiff secured no information, and, accordingly, had none to give to defendants. Either Carroll testified falsely, or Gorman and Clark testified falsely, and it was the province of the jury and not of the Court below, to make the ultimate decision.

Considering the contradicted testimony of the plaintiff, there is abundant authority that it is improper to direct a verdict in a case where there are questions of veracity among the various witnesses. (*Madison v. White*, 60 App. D. C. 329; 54 Fed. (2d) 440.)

“Whether a witness who has sworn falsely as to a material fact is to be believed as to other matters testified to by him is a question of fact for the jury.” (*Oliver v. Cameron, McArthur & M.*, 11 D. C. 237).

“The credibility of a witness and the weight to be given to their testimony are questions for the jury.” (*Harrison v. Davis Construction Co.*, 42 App. D. C. 255).

“Facts are primarily within the jury’s function, and hence it must be given wide latitude.” (*Christie v. Callahan*, 75 U. S. App. D. C. 133, 124 Fed. (2) 825).

"Jury and not court must pass upon credibility of testimony." (*Old Dominion Stages v. Connor*, 67 App. D. C. 158; 90 Fed. (2d) 403).

And to the same effect see cases:

Walford v. McNeil, 69 App. D. C. 247; 100 Fed. (2d) 112;

McCartney v. Holinquist, 70 App. D. C. 334; 106 Fed. (2d) 855; 126 A. L. R. 375.

Fleming v. Fisk, 66 App. D. C. 350; 87 Fed. (2d) 747.

Considering the conflict in testimony as shown above, it is submitted that the jury as reasonable men might have differed on the right of plaintiff to recover, and that a directed verdict was erroneous.

Point II.

A newspaper story of Plaintiff's background, with pictures, was improper and prejudicial.

The Court allowed the plaintiff to put in evidence a story concerning him, printed in the Oakland Tribune on November 26, 1941, together with photographs of plaintiff (Jt. App. 35-36). This story, written in a rather brilliant tone, as far as plaintiff was concerned, told of his background at the shipyard, and the excellent service he had performed there. The story, photographs of plaintiff, and pictures of the shipyard, which plaintiff allegedly designed and built, were shown to the jury over objection of counsel for defendant (Jt. App. 36). Yet, in order to refute this testimony when counsel endeavored to show the reputation of plaintiff with Clark and other members of his staff, the Court disallowed such testimony. It is not the position of appellant that reputation or character is permissible in an action of this type, and had the Court not permitted the contents of the newspaper article to be admitted, then counsel for defendant would not have pressed for any testimony regarding the reputation of defendant with Mr. Clark and his staff.

The newspaper article was not proper and may have prejudiced the Court's mind when he directed a verdict for plaintiff; yet, there was no way for defendant to rebut such evidence except by inquiry into the reputation of the plaintiff at the very agency where he testified under oath that he "interceded" and secured "information" for the defendant.

The Court allowed this testimony since it believed that the plaintiff had a right to show that he was "not simply an irresponsible person who has made up this story, but that he is a responsible man, and for that reason it is admissible, if it does show that. I do not know what it shows." (Jt. App. 36).

In another part of the record the Court stated that he allowed this evidence to be introduced since the plaintiff had a right to show that he is not a "fly by night, an adventurer." (Jt. App. 98).

There was no issue of reputation or character of the plaintiff in this case. The only issue was whether a contract had been made by plaintiff with defendants, and, if so, had that contract been performed by plaintiff? The newspaper story of plaintiff's background was improper and tended to prejudice the Court's mind in directing a verdict. This is particularly indicated by the feeling of the Court that the absence of defendants at trial showed a complete lack of defense, while the newspaper story pictures the plaintiff as a reputable and outstanding man as a builder of shipyards.

The newspaper story was hearsay and the defendant had no opportunity to cross-examine the person who wrote it. More than that, the character of plaintiff was not the issue and therefore evidence of character was inadmissible. See *Thompson v. Bowie*, 71 U. S. (4 Wal.) 463, 18 L. Ed. 423.

Point III.

The Court was prejudiced against defendant because of non-appearance of both defendants at the trial

The Court was disturbed because neither defendants had appeared to defend the case. In giving further reason why the evidence of reputation of plaintiff as shown above was prohibited, the Court stated that the uncontracted evidence of plaintiff

“shows actual rascality on the part of Robinson and Nolen, and neither Robinson or Nolen has seen fit to come to this courtroom to defend himself.” (Jt. App. 98.)

Nolen, a resident of Massachusetts, the Court said “evaded service” (Jt. App. 102).

There is no evidence that Nolen had evaded service, and it would have been improper for such testimony to be taken. It was not an issue in the case. The true situation is clearly shown in the record (Jt. App. 7).

The Court should have submitted the testimony to the jury as it existed on the record, and not assumed that the defendant's absence created an inference of liability. Nolen was not a party to this action, and there was no legal reason why he should appear. In any event, any inference to be drawn by reason of the absence of the defendant Robinson was one for the jury, not the Court to draw, and it was error for the Court to do so.

In the case of *Colbert v. Anacostia and P. R. R. Co.*, 41 App. D. C. 171, it was argued that failure of plaintiff to call witnesses raised a strong presumption of law against her. The Appeals Court stated that it would have been more satisfactory had such evidence been produced:

“but be this as it may, the question that we have to determine turns upon the legal sufficiency of the testimony actually produced before the jury, and not upon what might have been produced.

“Any inference of fact that may be deduced is for the jury and not for the Court.”

Point IV.

Carroll's contract was void and unenforceable on grounds of public policy because the compensation was contingent on procuring a sale of surplus war materials from the Government to Robinson.

Carroll's contract contemplated an illegal bargain because the compensation being contingent, the contract has a tendency to promote improper influence on Government officials entering into a public contract.

Williston on Contracts, Vol. VI, Sec. 1729A, p. 4882, states the law as follows:

"Closely analogous to lobbying bargains are those which have for their object obtaining a contract with the national government or with a state or municipality, where no legislation is required. There is no doubt that a bargain is illegal which contemplates bringing improper influence to bear upon the official or body having power to enter into the public contract in question. But is the employment of an agent to solicit the contract upon a promise of payment contingent on success obnoxious to policy as it is in lobbying bargains? The Supreme Court of the United States has answered this question in the affirmative saying that 'there is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments;' and holding broadly that a contract to give any agent compensation dependent on his success in procuring a public contract was necessarily illegal." Citing *Tool Co. v. Norris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Hazelton v. Sheckells*, 202 U. S. 71, 26 S. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217; *Gesellschaft fur Drahtlose Telegraphie M. B. H. v. Brown*, 78 F. (2d) 410, 64 App. D. C. 357.

Williston further states that the Supreme Court later modified its previous sweeping statements in the *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

This Court in *Gilbert v. Noonan*, 63 App. D. C. 30, 68 Fed. (2) 775 held that a contract to secure passage of legislation from Congress or an order of the Public Utilities, was void and contrary to public policy and unenforceable because the attorney fee was based upon contingent compensation. This Court stated:

“A contract for services to be rendered by an agent or attorney before a legislative body in securing the passage of a measure is lawful if it does not contemplate the use of improper means. Where the compensation for procuring legislation is contingent, the contract is void as against public policy, regardless of whether corrupt practices are resorted to or contemplated. *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314, 336, 14 L. Ed. 953; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868; *Trist v. Child*, 21 Wall. 441, 452, 22 L. Ed. 623; *Hazelton v. Sheckells*, 202 U. S. 71, 79, 26 S. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217; 6 R. C. L. 735, para. 140; 13 C. J. 432, para 368.

“In the *Norris Case* the court said:

“‘Agreements for compensation contingent upon success suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.’ 2 Wall. at page 55, 17 L. Ed. 868. The court further observed that ‘the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements.’

“It was held in the *Sheckells Case* that the contract involved a contingent fee for services which, when rendered, were legitimate. The court said (202 U. S. at page 79, 26 S. Ct. 567, 568, 50 L. Ed. 939, 6 Ann. Cas. 217): ‘We assume that they (the services) were legitimate, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case.’

“That the contract in the present case was contingent in part is clear. While plaintiff was to receive

\$500 in any event, the payment of the additional \$500 was contingent upon success. 'Every part of the consideration goes equally to the whole promise, and therefore, if any part of it is contrary to public policy, the whole promise falls.' *Hazelton v. Sheckells*, 202 U. S. 71, 78, 26 S. Ct. 567, 50 L. Ed. 939 6 Ann. Cas. 217. 'That which is bad destroys that which is good, and they perish together.' *Trist v. Child*, 21 Wall. 441, 452, 22 L. Ed. 623."

Since the Supreme Court has stated "There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments," we submit that the principle of *Gilbert v. Noonan supra*, should apply in the instant case and Carroll's contract be declared void and unenforceable. Carroll's contract was based upon a straight contingent of 5% commission on whatever purchases the defendant's made of war surplus materials from the Maritime Commission.

The test of the validity of the contract is not whether or not illegal or improper methods or influences were to be brought to bear on public officials but the test is whether or not the contract has a tendency to promote the use of improper influence or corruption on public officials. In the case of *Davidson v. Button Co.*, 137 N. J. Eq. 357; 44 Atlantic 2nd, 800; 113 N. J. Eq. 113; 46 At. 2nd 786, it was held that a contract to secure 12½% compensation contingent upon securing national defense contracts from the Government, was void and unenforceable because the compensation was contingent upon success and tended to influence and procure corrupt bargains with regard to securing governmental contracts. See also *American Seating Co. v. Zell*, 322 U. S. 709, 88 L. Ed. 1552, 64 S. Ct. 1053 (Judgment of Circuit Court reversed and Dist. Ct. affirming. See 138 Fed. (2d) 641); *Muschany v. U. S.*, 324 U. S. 49, 892 L. Ed. 29; 65 S. Ct. 530.

We submit that the motion for judgment on the pleadings and/or motion for summary judgment should have

been granted by the lower court that the contract was null and void and unenforceable on grounds of public policy and that the terms of the contract as narrated from the witness stand by the plaintiff Carroll shows on its face, that his compensation was contingent on securing a contract, and that the contract is contrary to public policy and should not have been enforced.

Carroll testified that he was to "intercede" with the staff members of the Maritime Commission in securing the sale of surplus war materials to the defendant as well as to get information ahead of time by virtue of his being "on the ground," before the various prospective purchasers and other members of the public could obtain the information. This testimony in and of itself showed that improper means were to be used and were used by Carroll in his efforts to obtain a sale of war surplus materials to the defendants. The fact that Carroll stated he was to intercede for the defendants shows that he was to personally solicit the staff of the Maritime Commission for the sale of war surplus materials to the defendant.

The *Tool Company v. Norris* and *Hazelton v. Sheckells* cases, *supra*, which have been reaffirmed by the Supreme Court in the *American Seating Co. v. Zell*, and *Muschany v. U. S.*, *supra*, reasoned that the contract of compensation is stricken down and unenforceable where it is based upon contingent compensation because that type of contract has a *tendency to promote the use of improper and evil* means in the securing of public contracts. Carroll's testimony shows that he was to use improper means and influence on Government officials in securing a contract, and that he secured "favours" from Government heads. The Supreme Court cases hold that where the compensation is contingent for securing a public contract, the tendency of such contracts is to promote sinister and improper acts and the contracts are therefore void on the grounds of public policy. The instant case not only has a contingent compensation but the record shows that Carroll testified that he "secured favours from Government officials"

and also used his personal influence to "intercede with Government officials."

Point V.

The Trial Court should have submitted question to the jury as to whether or not Carroll's contract by its very terms contemplated the use of lawful and legitimate acts as a broker in securing the sale of War Surplus materials to defendants, or whether from the testimony of Carroll, the nature of Carroll's contract was to promote the use of Carroll's influence with Government officials in an endeavor to secure the sale of surplus materials to the defendants.

Plaintiff's position, according to his testimony, was that he was able to secure information from the Maritime Commission relative to these engines prior to any other persons, including defendants. This by reason of the fact that he was there "on the ground" getting "first hand information," which other people possibly might not get for a couple of weeks. "That was the service [information] that Judge Nolen and Robinson [the defendants] wanted" (Jt. App. 43). The plaintiff also stated that he was to "intercede" with the officials at the Maritime Commission in an effort to secure information relative to the purchase of these engines by the defendant. It became a question, therefore, whether the plaintiff was seeking and actually did receive favors from these officials in getting information prior to its being released to the general public. The defendants had a right to have this testimony submitted to the jury with an instruction from the Court that if the plaintiff was being favored by the officials of the Commission and that Carroll's contract contemplated that plaintiff would use his influence and seek and gain these favors, that such an agreement as a matter of law was void as opposed to public policy. The jury should have considered Carroll's testimony that he was a former employee of the Maritime Commission and that he had "influence" and

would "intercede" for defendants, and could get "information" ahead of other purchasers. Further, the jury should have been able to consider the five per cent contingent fee—a \$20,000 fee—for procuring the sale and purchase of war surplus materials, and what effect if any, it had when the sale and purchase were regulated and controlled by the Surplus Property Act of 1944. Further, the jury should have considered the question as to how and why Carroll could receive inside "information" ahead of other prospective purchasers in view of the War Surplus Property Act of 1944, and whether the \$20,000 contingent fee might tend to produce and promote sinister influence.

The plaintiff takes the position that he was the moving cause in the reduction of the price of the engines from \$910 to \$750 each. If the jury had been allowed to view all the testimony, it should have been instructed by the Court that if the contract contemplated that plaintiff on behalf of defendants was to secure a reduction in the form of a favor through the officials of the Commission, that such a contract would have been void as opposed to public policy. Not only does the plaintiff infer in his testimony that he secured the equipment for a decidedly less amount than was advertised in the list price available to the public, but his position is that he secured a reduction also. The plaintiff said that he interceded on behalf of defendants with the officials of the Maritime Commission, and the jury having knowledge of what the word "intercede" means, might well have concluded that the plaintiff because of his acquaintance with the officials at the Commission, or being "on the ground," received the discount because of either of these reasons (Jt. App. 59).

Contracts which contemplate no more than the presentation of arguments or legitimate persuasion in inducing the sale to the Government or from the Government are not forbidden, even when based on contingent compensation, but contracts based on contingent compensation which by their nature or terms contemplate personal solici-

tation or the use of personal influence offend public policy and are held unenforceable in the courts.

The distinction between personal influence used to secure public contracts and legitimate professional services performed in making public officials acquainted with the elements of merchandise to be sold is well pointed out in the case of *Trist v. Child*, 88 U. S. 441, 22 L. Ed. 623; and the same court in passing on a similar question, cited with approval the doctrine laid down in the *Trist* case in *Oscanayan v. Arms Company*, 103 U. S. 261, 26 L. Ed. 539. Many courts have submitted to a jury the question as to whether or not the terms and the nature of a particular contract bargain of employment to procure a public contract is a question of fact for a jury to determine whether or not the contract contemplated the use of legal or illegal means in the securing of a public contract and whether or not such a contract was legal.

Allison v. Dodge, 287 Fed. 621 (CCA 3)

Lewy v. Standard Plunger Elevator Co., 296 Ill. 125
129 N. E. 775

Lydiard v. Coffee, 158 Minn. 520; 198 N. W. 140

Chard v. Ryan Parker Const. Co., 182 App. D. 455;
169 N. Y. Supp. 622.

In the *Allison v. Dodge Case*, *supra*, the Third Circuit Court of Appeals in reversing the case and submitting it for a new trial where the Judge had rendered a non-suit against the plaintiff, stated:

“The testimony in the case at bar, as developed on direct examination and cross-examination, discloses two distinct questions of fact. The first is: Did Allison, by reason of his friendship with a purchasing agent of the British government, contract to use his influence with that agent, or, without contract, did he influence that agent, in an endeavor to secure the case contract for the Remington Arms? The next question is: Did the Remington Arms make Allison its agent in the matter of the case contract and did Allison in

the performance of a contract of agency legitimately lay the claims of his employer before government officers authorized to contract?

"It is not until these questions have been answered that a court can apply the law in this case; and as these questions are purely questions of fact, the only forum capable of answering them is a jury. If, on submission, the jury should answer the first question in the affirmative, then clearly the first rule of the Oscanyan case controls and the contract is corrupt and unenforceable. If the jury should answer the second question in the affirmative, then the second rule of the Oscanyan case controls and the contract is valid and enforceable. There is enough evidence for a jury to answer either question in the affirmative or in the negative and accordingly enough evidence to sustain a verdict either way. For these reasons we think the trial court fell into error in applying the law to this case before the jury had determined the facts."

In the *Ryan case, supra*, the New York Appellate Division in submitting their contract to the jury as to whether or not a lawful or unlawful contract was bargained for by the parties, and holding that it was a jury question, stated as follows:

"Taking into consideration all of these matters and adding the vagueness of the services stated in the contract the fact that plaintiff's compensation depended in the first instance on the contract being awarded, the fact that the plaintiff was not in any respect concerned with the bridge building business but was in the business of life insurance and advertising and the *very large sum claimed for such services as were rendered*, a question of fact for the jury was presented by the conflicting testimony and the conflicting inferences to be drawn as to the real purpose and intention of this very extraordinary contract." (Italics ours)

In *Noble v. Mead-Morrison Mfg. Co.*, 237 Mass. 5, 129 N. E. 699, the court said (p. 24):

"Ordinarily no one factor is decisive in determining whether the contract concerning furnishing supplies

to the government is void as contrary to public policy. Contingency of compensation upon success, percentage upon the amount involved in sales directly to the government, and the size of the fee, all are elements entitled to consideration. . . . The tenor of the contract may be such in connection with its setting as to stamp it with invalidity. . . . The question of the legality of the contract in each case is to be determined by weighing all the elements involved and then deciding whether its inherent tendency is to invite or promote the use of sinister or corrupt means to accomplish the end or to bring influences to bear upon public officials of any other nature than the single one of genuine advantage to the government. . . . If that point is open to fair doubt upon all the evidence, its purpose must be left to the jury under appropriate instructions.”

Carroll's contract is contrary to public policy because it is based upon a contingent fee of five per cent of the amount of whatever engines or equipment the defendants would purchase from the Government. The consideration was that Carroll would give the defendants notice of what was for sale and was to use his “influence.” Carroll would “intercede” for the defendants with the officials of the Maritime Commission. As was stated in the *Norris Case, supra*, it is not a question of whether proper or improper means were used, but it is a question as to whether or not the tendency of such contract would suggest the use of sinister and corrupt means by virtue of the remuneration being contingent. Because the remuneration is contingent the very nature of the contract would put a greater urge upon the accomplishment of the end of the contract upon Carroll or any other person working on a contingent fee that might force him to use improper means with Government officials, heads of departments and thus the courts have struck such contracts down.

Further, the Congress passed the Surplus Property Act of 1944 (U. S. Code, Congressional Service, 78th Congress, Second Session, 1944, Page 764). The Act is known as the “Surplus Property Act of 1944, Ch. 479, P. L. 457.”

This Act set up a Surplus Property Board in the office of War Mobilization. The object and purpose of this Board was to control the disposition of all surplus property of every Government agency. It set forth what property should be sold and how the Government surplus property should be disposed of. It prohibited any person who had been connected with the agency for a period of two years from acting as attorney, agent or negotiating the sale or purchase of any of this equipment with the department that such person formerly was connected with. It empowered the Board to set up rules and regulations for the disposition of materials and equipment declared surplus by this Board. It further provided that all Government Departments should first offer surplus property to other Government Departments in case they needed it and that preference should be given to veterans, as well as hospitals, educational and non-profit institutions. Rules and regulations were promulgated wherein the property had to be advertised by bulletins before it could be sold and the price fixed by the Surplus Property Board. In other words, the disposition of surplus property was governed completely by an Act of Congress as to price, advertising, priority preference and how the property should be sold.

The Maritime Commission was made a disposal agency by virtue of an order of the Director of the Surplus Property Board effective May 1, 1945, § 8301, subparagraph c, for the disposal of all marine real and personal property. See U. S. Code Cong. Serv. 1945, p. 1403-1406. This order set forth by the Surplus Property Board gave to each government bureau including the Maritime Commission the form on which the matter should be reported to the Surplus Property Board.

There was a bulletin issued by the United States Maritime Commission captioned "Surplus Bulletin 20, Release date—June 20, 1945," which bulletin was mailed to all prospective purchasers of Government surplus equipment and materials. There was listed in the bulletin the sale of Marine Engines, the type and kind of engine and where

they were located and the price, which included the very engines that were the subject of the present litigation. This information was available to the entire public. Carroll so testified (R. 78, 79). Carroll testified that the nature of his services was to get information and to intercede with the Commission for the defendants. Under the Surplus Property Act of 1944 and the regulations promulgated thereunder, each Government Agency had to advertise the property before it could be sold. As stated in the Maritime Commission's Surplus Bulletin No. 20, all Government departments and lesser agencies were notified if they wished to claim any of the property under the Surplus Property Act of 1944, and notice should be given to the Maritime Commission by July 20, 1945.

The defendants were already fully apprised of the purchase price and of the number and types of engines that were for sale by the Government in the bulletin that the Maritime Commission was compelled to send out under the rules and regulations for the sale of surplus property as promulgated by the War Surplus Board under the Surplus Property Act of 1944. The jury should have been informed of the provisions of the War Surplus Act of 1944 and of the nature and policy of that Act, and of the various rules and regulations promulgated by the Surplus Property Board or the War Assets Administrator who succeeded to the rights of the War Surplus Property Board by act of Congress of September 18, 1944. (See 50 U. S. Code Ann., App. Sec. 1614 (b), p. 439.)

Since the Surplus Property Act required the department heads to make disposition of war surplus property according to Rules and Regulations, i. e., the various priorities that were to be given to Government agencies, such as municipalities, veterans and educational and non-profit institutions, and inasmuch as the rules and regulations of the Surplus Property Board set the prices that were to be charged for various war surplus goods, including machinery, engines, etc., the jury should have been instructed by the court of the nature of the War Surplus Act and

of the limitation on department heads on the sale of war surplus material so that the jury could be fully apprised of whether or not Carroll legitimately or illegitimately intervened for and on behalf of the defendants.

Point VI.

Assuming arguendo that Carroll had a valid broker's contract, then it was incumbent upon Carroll to show that he was the procuring cause of the sale.

If we assume arguendo that Carroll's contract was a valid broker's contract, Carroll would have to have proven (1) the nature of his contract as a broker; (2) the terms of compensation; and (3) that Carroll undertook the contract and either completed the sale himself or proved that he was the "procuring cause" of the sale.

The evidence is clear that the contract was closed out by Nolen and Clark. Clark who was head of the Surplus Properties Department of the Maritime Commission testified that Nolen came directly to him and requested the reduction of the price of the Continental engines from \$910 to \$750 (Jt. App. 86). Gorman testified that Carroll had nothing to do with the question of the reduction of the sale price of the Continental engines from \$910 to \$750 (Jt. App. 76). Clark took the matter up with the Price Panel of the Surplus Properties Section of the Maritime Commission and had them agree that if all of the engines could be sold in the same lot they would reduce the price \$750 (Jt. App. 86). Nolen negotiated this. Carroll had nothing whatever to do with the closing out of the sale. He was not the procuring cause of the sale because the goods were advertised generally to the public under the terms of the Surplus Property Act of 1944 and ensuing rules and regulations. Under date of June 20, 1945, Surplus Bulletin #20 was issued by the U. S. Maritime Commission, offering for sale various engines and equipment at various sites of the United States on the West Coast at Long Beach, Tiburion, Mare Island, San Diego, California

and various other places in the middle west and on the East Coast. The first page of this bulletin reads as follows:

U. S. MARITIME COMMISSION

WASHINGTON 25, D. C.

SURPLUS BULLETIN NO. 20

Release Date: June 20, 1945

This bulletin is being issued simultaneously to Government Departments and Agencies and other prospective purchasers. It is issued every ten days and lists all surplus items declared to the Maritime Commission since the last bulletin was issued. In the disposal of the material listed herein, the priority for acquisition will be as follows:

1. TO ALL GOVERNMENT DEPARTMENTS AND AGENCIES: All material listed herein is being made available first to Government Departments and Agencies, subject to prior disposal to such Departments and Agencies, for transfer with exchange of funds. It will be assumed that there are no Government requirements for items on which notification of interest has not been received before *July 20, 1945*, and on this date such items will be offered for sale to the public. Inquiry should be made as to the availability of any of the items listed herein before proceeding with the issuance of a purchase order or requisition and bill of lading.

2. TO ALL OTHER PURCHASERS: Items not disposed of by transfer within the Government will become available for sale to the public beginning *July 20, 1945*. Replies to inquiries will be withheld until the date of availability is reached, in order that the information regarding availability of the items can be furnished, together with the exact locations at which the items are held, hours when they may be inspected and the prices at which they are being offered.

This advance information to purchasers, other than Government Departments and Agencies, does not permit inspection of property prior to the date set for commencement of sale to the public, except upon written permission.

Address all inquiries to the Materials Disposal Section, Contract Settlement and Surplus Materials Division, U. S. Maritime Commission, Washington 25, D. C., Telephone: EXecutive 3340.

Thereafter, the various items throughout the bulletin which were for sale are listed, showing where located and the quantity.

There is nothing within the terms of the alleged agreement between Carroll and Nolen and Robinson that gave Carroll the exclusive right to make any and all purchases for Nolen and Robinson with the Government. Any such agreement would be illegal and contrary to public policy.

Restatement of Contracts, §542(1)(b);

North Chicago Railway Company v. Ackley, 171 Ill. 100; 49 N. E. 222;

Proctor & Louisville & N. R. Co., 192 Ky. 330; 233 S. W. 736.

Nolen and Robinson had the right to close this deal out themselves directly and were not responsible to Carroll for any commission, assuming a valid contract. The evidence is clear that Carroll did not procure the sale of these engines from the Government for Nolen and Robinson but that Nolen and Robinson closed the deal out themselves, and, therefore, there is no liability whatsoever on the part of Nolen and Robinson to Carroll. See *O'Connor v. Hudson River Line*, 58 N. Y. Supp. (2d) 175; Affirmed, 296 N. Y. 501.

There is a direct and sharp conflict of the testimony on his part as to whether or not Nolen and Robinson closed out the contract directly with the Government, absence any help, aid or assistance whatsoever from Carroll. The fact of the matter is that Carroll never knew that Nolen had closed out the deal and purchased the engines until he inadvertently heard from an employee of the Maritime Commission that the deal had been made. This was a question of fact for the jury to determine as to whether

or not Carroll was the procuring cause of this sale or whether or not the sale was actually closed out by Nolen and Robinson themselves.

Point VII.

Plaintiff Carroll was never authorized to practice before the Maritime Commission under the Rules and Regulations governing practice before that Commission.

The plaintiff Carroll was not a lawyer and in his effort to sustain his proposition that he was authorized to practice before the Commission, he presented a letter, Plaintiff's Exhibit #1, signed by A. J. Williams, Secretary of the Maritime Commission, dated January 6, 1945, addressed to Messrs. Briarly and Gordon. Plaintiff's Exhibit #1 merely stated that Carroll had filed an application to practice before the Commission and pending action by the Commission upon his application, they should take this letter as authorization for him to practice.

Mr. Carroll further stated at the time of trial in 1948:

"Q. Was your application to practice ever rejected?

"A. No, sir. Not to my knowledge." (Jt. App. 17-18)

Counsel for the defendant can state to the Court that checking with the Maritime Commission Secretary's office, Mr. Carroll has never been admitted to practice before the Maritime Commission. Since Mr. Carroll has never been admitted to practice before the Maritime Commission, it can be flatly stated that Mr. Carroll's application for admission to practice was rejected by the Commission. The Rules and Regulations of the Maritime Commission provide as follows:

"§ 203.1 *Practice before the Commission defined.* Practice before the Commission shall be deemed to comprehend all matters connected with the presentation of any matter to the Commission, including the preparation and filing of necessary documents, and

correspondence with and communications to the Commission. The term 'Commission' as used herein includes any bureau, division, branch, section, unit, office, or field office.

"§ 203.2 *Attorneys at law.* Attorneys at law who are admitted to practice before the Federal courts or before the courts of any state or Territory of the United States may practice before the Commission. An attorney's own representation that he is such in good standing before any of the courts herein referred to will be sufficient.

"§ 203.3 *Persons not attorneys at law.* Any person who is not an attorney at law may be admitted to practice before the Commission if he is a citizen of the United States and files proof to the satisfaction of the Commission that he possesses the necessary legal, technical, or other qualifications to enable him to render valuable service before the Commission and is otherwise competent to advise and assist in the presentation of matters before the Commission. Applications by persons not attorneys at law for admission to practice before the Commission shall be made on the forms prescribed therefor, which may be obtained from the Secretary of the Commission, and shall be addressed to the United States Maritime Commission, Washington, D. C. *No person who is not an attorney at law and whose application has not been approved shall be permitted to practice before the Commission.* This provision and the provisions of §203.5, 203.6, and 203.7 shall not apply, however, to any person who appears before the Commission on his own behalf or on behalf of any corporation, partnership, or association of which he is an officer or regular employee.

"§ 203.7 *Statement of interest.* The Commission, in its discretion, may call upon any practitioner for a full statement of the nature and extent of his interest in the subject matter presented by him before the Commission. Attorneys retained on a contingent fee basis shall file with the Commission a copy of the contract of employment.

We submit to the Court that Mr. Carroll was not lawfully authorized to practice before the Commission as a

person who was not an attorney at law within the meanings of Section 203.3 of the Commission's regulations. The letter given to Mr. Carroll by Secretary Williams undoubtedly was an ad interim emergency matter permitting Mr. Carroll to discuss with those two officials only, officially before the Commission, while his application was pending.

The records of the Commission show that Mr. Carroll has never been admitted to practice and accordingly his application for admission to practice was rejected. Under the Rules of the Commission, since he was not an attorney at law and his application had not been approved, he was not entitled to practice before the Commission. Further attorneys were compelled under § 203.7 to file with the Commission a copy of the contract of employment when it was based on a contingent fee. By construction, this rule also applied to Mr. Carroll, assuming that he was lawfully authorized to practice before the Commission, and since he attempts to justify his position that he could lawfully practice before the Commission, he should have informed the Court that he had filed with the Commission a copy of his contract of employment on a contingent fee basis.

Above and beyond the question that Carroll was legally authorized to practice before the Commission, and the records of the Commission so support this statement, and assuming the position that he was entitled to practice before the Commission, he should have filed a copy of his contract of employment with the Commission, since it was based on a contingent fee.

The rules of the Commission are strict with respect to former employees practicing before that Commission. The Rules provide as follows:

§ 203.9 *Former employees; affidavit.* Such applicant shall be required to file an affidavit to the effect that he gave no personal consideration to such matter and gained no knowledge of the facts involved in such matter during and by reason of his Government service, and that he is not associated with, and will not in

such matter be associated with, any former member, officer, or employee of the Commission who has gained knowledge of the matter during and by reason of his Government service; and that his employment is not prohibited by any law of the United States or by the regulations of the Commission. The statements contained in such affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

§ 203.10 *Former employees; applications for consent.* Applications for counsel should be directed to the Commission and should state the former connection with the Commission of the applicant and identify the matter in which the applicant desires to appear. The applicant shall be promptly advised as to his privilege to appear in the particular matter, and the application, affidavit, and consent, or refusal to consent, shall be filed by the Commission in its records relative thereto. Separate consents to appear must be obtained to appear in separate cases.

§ 203.8 *Former employees. (a) Practice prohibited.* No person shall practice, appear, or represent anyone before the Commission in any matter to which he, as member, officer, or employee of the Commission, or as officer or employee of the United States gave personal consideration or as to the facts of which he gained knowledge during and by reason of his Government services

(b) *Further prohibitions with exceptions.* No former member of the United States Maritime Commission shall practice, appear, or represent anyone before the Commission or act as the employee of an attorney or agent, in any matter which was pending before the Commission during the period of his membership in the Commission. No former officer or employee of the United States Maritime Commission shall practice, appear, or represent anyone before the Commission, or act as the employee of an attorney or agent, within two years after the termination of his service with the Commission, in any matter which was pending before the Commission during the period of his employment by the Commission, unless he shall first obtain the written consent of the Commission. This

consent will not be granted unless it appears that the applicant did not, as officer or employee of the United States, give personal consideration to the matter, to handle which consent is sought, or gain knowledge of the facts of said matter during and by reason of his Government service.

Further, since Mr. Carroll stated in the record of the trial that in the course of his duties while he was employed with the Maritime Commission in connection with the construction of shipyards on the West Coast and to show his knowledge of Marine equipment, he stated that he was in charge of the construction of the shipyards on the West Coast and "it was part of my duty to approve every purchase that Henry Kaiser made for the facilities constructed in those yards" and that when he left the Pacific Coast, they had already "started to build ships, in fact had launched ships," and his job was completed in getting Kaiser started. (Jt. App. p. 15, 16, 17.)

Since Carroll was a former employee in charge of the construction of shipyards on the West Coast, there is a very serious question as to whether or not this information as to the sale of these Marine engines was not knowledge and information, and the knowledge and information had not been obtained by Carroll as a former employee inasmuch as he would have to give an affidavit in accordance with Rule 203.9 "gained no knowledge of the facts in such matter" during and by reason of his Government services. Rule 203.10 provided that separate consents to appear must be obtained in separate cases.

It is respectfully submitted to the Court that Carroll was not authorized to practice before the Commission within the meaning of Rule 203.3, captioned "*Persons Not Attorneys at Law*," and further the Commission's records show that he has never been admitted to practice. The Secretary of the Commission, Williams, could not give him authority to practice before the Commission, but only the Commission itself could authorize him to practice and that

Carroll should have filed a copy of his contract based on a contingent fee with the Commission within the meaning of Rule 203.7, and that for these reasons alone the contract is illegal and unenforceable by the Court.

See Williston on Contracts, Vol. VI, § 1765, which provides:

“Where a statute requires a broker to obtain a license before sale of the kind in question can be negotiated by him, there is no doubt that if such a sale is made by one acting as a broker without the required license, he can recover no compensation for his services, in spite of the fact that the license has been procured before the Commissions become due. And even though sale of particular goods is not illegal in itself, if the seller is violating the law in selling them without complying with some statutory prerequisite, the policy of the law generally denies recovery of the price.” (See Restatement, Contracts, § 580 (2) (d) and cases cited).

CONCLUSION

It is submitted that viewing the conflicting evidence in the entire record, the Court erred in directing a verdict for the plaintiff, and the judgment should be reversed.

MARTIN F. O'DONOGHUE,
THOMAS X. DUNN,
Attorneys for Appellant.

O'DONOGHUE, DUNN, MILLS
& WALSH,
831 Tower Building,
Washington 5, D. C.

APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 9881.

HENRY S. ROBINSON, *Appellant*,

v.

RUSSELL J. CARROLL, *Appellee*.

Appeal from the District Court of the United States for the
District of Columbia.

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS.**

197

Filed Aug 29 1945

IN THE DISTRICT COURT OF THE UNITED
STATES,

FOR THE DISTRICT OF COLUMBIA.

RUSSELL J. CARROLL, 1718 Rhode
Island Ave., N. W., Washington,
D. C., *Plaintiff*,

vs.

HENRY S. ROBINSON, 120 Broadway,
New York 5, New York and JAMES
R. NOLEN, 120 Broadway, New
York 5, New York, *Defendants*.

Jury Action.

Civil Action
No. 30396.

CHARLES E. STEWART, *Clerk*.

Complaint for Money Judgment.
(Commissions.)

1. The amount of the plaintiff's claim exceeds the sum of \$3000.00, exclusive of interest and costs and is within the jurisdiction of this Court.

2. Plaintiff sues the defendants for that, heretofore, to-wit on or about February, 1945, said defendants entered into an agreement with the plaintiff herein whereby said defendants undertook and agreed to pay the plaintiff as commissions, a sum equal to five percent on the purchase price of all engines or equipment which said defendants may have for their own account or for the account of others purchased from the United States Maritime Commission, the information concerning the description and location of said engines or material having been theretofore furnished by the plaintiff to the defendants; that thereafter

on the day aforesaid and as a result of the information supplied by the plaintiff to the defendants said defendants did purchase from the United States Maritime Commission 125 Continental Engines and 20 Superior Engines Model SMRA No. 4 and 12 Atlas Imperial Engines Model 6 HM No. 2124 and 2 Superior New Engines Model SMRA

No. 4 and 4 Superior Engines Model SMRA No. 6, 198 for the total price of \$403,250.00 and that by reason thereof the said defendants became and are now indebted to the plaintiff, as commissions, the sum of \$20,162.50, said sum being five percent of said purchase price of the motors and equipment as aforesaid; that although plaintiff has often requested of the defendants to pay said sum of \$20,162.50 said defendants have wholly refused and still refuse to pay the same.

WHEREFORE, by reason of the premises plaintiff demands judgment of the defendants for said sum of \$20,162.50 with interest thereon from July 23, 1945, together with the costs of this suit.

MEYER J. SAWYER, *Attorney*,
1000 Investment Bldg.

Plaintiff requests a jury trial.

M. J. SAWYER.

* * * * *

199 Filed Sep 29 1945

**Answer of Defendant Henry S. Robinson to Complaint
for Money Judgment.**

1—Answering paragraph 1, Defendant admits that the District Court of the United States for the District of Columbia has jurisdiction of this matter.

2—Defendant denies each and every allegation contained in paragraph 2 of the Plaintiff's Complaint.

3—First Separate and Distinct Defense:

For a further defense to said Complaint, your Defendant, Henry S. Robinson, denies that he ever, in an indi-

vidual capacity or as agent for any other person, firm or corporation, engaged the said Plaintiff, Russell J. Carroll, to purchase for his account or for the account of any principal, certain surplus goods from the United States Maritime Commission. Your Defendant denies that as a result of any information that the Plaintiff gave to the said Defendant that the Defendant, Robinson, was thereafter able to purchase certain goods from the United States Maritime Commission. Your Defendant denies that any contract of employment of any kind was entered into by your Defendant with the Plaintiff, Russell J. Carroll, either by himself as an individual or for any person, firm or corporation.

4—Second Separate and Distinct Defense:

Your Defendant denies that the said Russell J. Carroll aided or assisted the said Defendant, Henry S.

Robinson, in any manner or method in procuring the purchase of certain surplus war goods from the United States Maritime Commission. Your Defendant further denies that the said Russell J. Carroll negotiated or procured for sale to Henry S. Robinson or any undisclosed principal of Henry S. Robinson certain surplus war goods from the United States Maritime Commission.

WHEREFORE, Defendant prays that the Plaintiff's suit be dismissed with costs against the Plaintiff.

MARTIN J. O'DONOGHUE,
JAMES R. NOLEN,
Attorneys for Defendant.

September 26, 1945.

* * * * *

215

Filed Oct 7 1947

**Motion for Judgment on the Pleading and/or Motion
for Summary Judgment.**

Now comes the defendants through their counsel and move the Court for a judgment on the pleadings and/or a summary judgment, and for reasons state as follows:

That the alleged contract as set forth in the complaint and as described by the plaintiff in his deposition filed herein is void as against public policy.

MARTIN F. O'DONOGHUE,
THOMAS X. DUNN,
Attorney for Defendants.

* * * * *

218

Filed Dec 5 1947

**Order Denying Motion for Judgment on the Pleadings
and/or Motion for Summary Judgment.**

This cause came on to be heard on motion of the defendants for a judgment on the pleadings and/or a motion for summary judgment, and the Court having considered the pleadings in the action, the deposition of the plaintiff, Russell J. Carroll, and the affidavit of John E. Clark, and having heard oral argument thereon, and it appearing to the Court that there are genuine issues as to material facts, it is by the Court this 5th day of December, 1947,

ORDERED, That the defendants' motion for judgment on the pleadings and/or motion for summary judgment be and the same is hereby denied.

BOLITHA I. LAW,
Chief Justice.

Seen:

NEWMYER & BRESS,

By ALBERT PHILIPSON,
Attorneys for Plaintiff, Russell J. Carroll,
 1001 15th Street, N. W.,
 Washington, D. C.

MARTIN F. O'DONOGHUE,
 THOMAS X. DUNN,

By MARTIN J. O'DONOGHUE,
Attorneys for Defendants, Henry S. Robinson,
 Tower Building.

* * * * *

219

Filed Oct 30 1946

Pretrial Proceedings.

STATEMENT OF NATURE OF CASE:

CHARLES E. STEWART, *Clerk.*

This is an action in which the plaintiff seeks to recover from the defendants, certain moneys which the plaintiff contends is due to him, by virtue of an oral contract between plaintiff and defendants under which plaintiff was to receive 5% of the net purchase price of certain machinery to be purchased by the defendants through the efforts of the plaintiff. Plaintiff contends that such machinery was so purchased through his efforts and that he is entitled to the commission above stated.

The defendant denies that any such contract, or any other contract, relating to the subject matter, was entered into between the plaintiff and the defendants. And, furthermore, defendants assert that no machinery was purchased by them through the efforts or negotiation of the plaintiff.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

Date October 30, 1946.

JAS. M. MORRIS,
Pretrial Justice.

M. J. NEWMYER,
Attorney for Plaintiff.
MARTIN F. O'DONOGHUE,
Attorney for Defendant.

* * * * *

220 Filed Feb 25 1948

Order.

It appearing to the Court that some confusion exists in the pleadings and motions in this cause as to whether the defendant James R. Nolen has entered his appearance as a defendant, and the Court having been informed by the attorney for the defendant Henry S. Robinson that the said defendant James R. Nolen has not appeared voluntarily nor has he authorized any one to file any pleading on his behalf, and upon the oral motion of attorney for the defendant Henry S. Robinson,

It is by the Court this 25th day of February, 1948

ORDERED that the above entitled cause proceed to trial as against the defendant Henry S. Robinson notwithstanding that the defendant James R. Nolen has not been brought within the jurisdiction of the Court, without prejudice to the rights of the plaintiff later to proceed against the defendant James R. Nolen when jurisdiction of this Court over him has been obtained.

S. B. ABERSON COUT,
Justice.

* * * * *

221

Filed Feb 27 1948

Verdict and Judgment.

This cause having come on for hearing on the 25th day of February, 1948, before the Court and a jury of good and lawful persons of this district, to wit:

Ellen L. Northedge, Helen W. Kershaw, Simon W. Scott, John H. Shea, Betty J. Vaughan, John B. Michael, Stephen J. Coffey, Eugene M. Parker, Ethel M. Taylor, Martha B. Plummer, Wilfred B. Thompson, John F. Devlin,

who, after having been duly sworn to well and truly try the issues between Russell J. Carroll, plaintiff and Henry S. Robinson, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 27th day of February, 1948, that they find the issues aforesaid in favor of the plaintiff by Direction of the Court, and that the money payable to him by the defendant by reason of the premises is the sum of \$20,162.50.

WHEREFORE, it is adjudged that said plaintiff recover of the said defendant the sum of Twenty thousand, one-hundred sixty two and 50/100 Dollars together with costs.

HARRY M. HULL, *Clerk,*

By WM. A. YATES,

Deputy Clerk.

By direction of

Justice, T. ALLAN GOLDSBOROUGH.

* * * * *

225

Filed Apr 30 1948

Order.

Upon consideration of the oral motion made herein, and it appearing to the Court that counsel for plaintiff has consented thereto, it is, by the Court this 30th day of April

ORDERED that plaintiff's Exhibits 1, 2, 3, 4, and 5 may be designated by the Clerk of the Court and those originals may be forwarded to the United States Court of Appeals for the District of Columbia without printing for the record.

T. ALLAN GOLDSBOROUGH,
Justice.

Consented to:

DAVID S. BRESS,
For Plaintiff.

THOMAS X. DUNN,
For Defendant.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

14 Russell J. Carroll,
the plaintiff.

* * * * *

Direct Examination

By Mr. Bress:

* * * * *

15 Q. What is your occupation or profession? A.
An engineer; structural and marine engineer.

Q. When you came to Washington in 1942 did you take an engineering employment with the Government? A. No. I took that prior, in 1940. I had spent several months here.

Q. When did you begin your employment with the Government as an engineer? A. In the fall of 1933.

Q. Now, did you remain in the employ of the Government constantly thereafter? A. No. I left the Government around January 1, 1938, which division I was in at that time was the Public Works Administration, which Harold Ickes had charge of. In June of 1940 I went back in the Government service again as plant engineer for the United States Maritime Commission.

Q. And how long did you remain with the Maritime Commission as an engineer? A. Till the spring of '42.

16 Q. During your occupation in that capacity with the Maritime Commission will you tell the jury the general nature of your engineering duties? A. I went with the Maritime Commission through men that I knew that were executives of the Commission, at their request, to proceed to the Pacific Coast and design and construct some shipyards at Richmond, California. Those yards Henry Kaiser took a contract on and operated during the war.

Q. Did you construct those shipyards?

Mr. Dunn: I object to this line of questioning, Your Honor. What has this got to do with the contract he sued on?

Mr. Bress: Very well. I will not pursue it further. I just wanted to give a full statement of the man's background and his familiarity—

The Court: The Court won't cut you off.

By Mr. Bress:

Q. In the course of your duties with the Maritime Commission in connection with the construction of shipyards, did you obtain information and knowledge about maritime equipment or marine equipment? A. I did, and it was part of my duty to approve every purchase that Henry Kaiser made for the facility contract in those yards.

17 Q. Now, you say that you were with the Maritime Commission until the spring of 1942. Will you state thereafter what your business or occupation was?

A. I came in from the Pacific Coast and started in business for myself again, which I was in prior to going out on the Coast, in the engineering and construction fields, and finding different equipment that was necessary or that was available that could be used by purchasers, both in this country and in some of our allied countries.

Q. When you left the Maritime Commission in the spring of 1942 the war was on. Will you state whether or not the shipyard construction job assigned to you was completed when you left the Pacific Coast? A. My agreement was to get the yards constructed and get them started to build ships. The yards that I had charge of had all launched ships, and my job was complete.

Q. In the course of your business, from the spring of 1942 thereafter, state whether or not there came a time in February, 1945, when you met the defendant Henry S. Robinson, and one James R. Nolen. A. I did.

Q. Did you enter into an arrangement with those men to do certain work for them? A. I did.

Q. Will you state how you happened to meet them and where you met them? A. A young man by the
18 name of John Light, who I had made the acquaintance of some eight to ten months prior to that, came to the office one day in the latter part of February, or about the 20th of February, said he was representing two clients by the name of Henry Robinson and James Nolen—he referred to him as Judge Nolen—who were at the Roosevelt Hotel. His work consisted of giving them—

Mr. Dunn: I object. I do not think he ought to go into what Mr. Light told him. Mr. Light is not here.

The Court: The Court overrules the objection. The Court thinks he has a right to make a sensible explanation to the jury as to the background of his meeting, if he did meet the defendant, in this case. Proceed.

Mr. Dunn: Providing he does not go too far, Your Honor.

The Court: Sir?

Mr. Dunn: I do not think he ought to go too far in the conversation with Mr. Light.

The Court: If there is anything in that which injures your case, you are right, but the Court cannot see that it is hurting your case.

The Witness: Mr. Light informed me about these two clients who were in town, and he also told me that he had spoken to them or informed them that he could not handle the type equipment and material that they wanted and asked if I would take it over. He called Mr. Robinson at the Roosevelt Hotel——

19 Mr. Dunn: I object to this, Your Honor. Mr. Light is calling Mr. Robinson at the Roosevelt Hotel.

The Court: Now, the Court is not going to the picayunish about this. Proceed, sir. You have an exception, sir.

The Witness: He called Mr. Robinson and Judge Nolen's room at the Roosevelt Hotel and talked to Robinson and told them that he had the conversation with me——

By the Court:

Q. You heard that end of it? A. I heard it. I was present. He also introduced me at that time to Robinson, on the telephone, and it was arranged that I was to call them later in the evening and make a definite appointment.

I was busy on some other matters, and it was 10 o'clock before I had a chance to call them.

Mr. Robinson said, "Yes." When I called he says, "We are waiting for you and I wish you would make an immediate appointment or meet us immediately at the Roosevelt Hotel."

I arrived there some time within ten or fifteen minutes of 10 o'clock. I met Mr. Robinson and Judge Nolen in the cocktail lounge.

After they finished their drinks we proceeded to their rooms. They explained to me what they wanted, that they were interested in landing craft, they were interested in automobiles, and they were interested in marine engines.

20 Judge Nolen gave me his card, and he said he was representing or very friendly with Chiang Kai-shek and Kai-shek's brother-in-law, who was Finance Min-

ister of China, had put this Chinese paragraph on the back of his business cards, and said that he wanted the boats, the engines, the automobiles, and any surplus that they may need, that he was representing a very good friend—he was representing Kai-shek and a very good friend of his brother-in-law's, who was Finance Minister, and he had an outlet for them.

In our course of conversation I asked how many automobiles he would be interested in, how many of the landing craft ships, and at that time I informed him that the landing craft ships were not available, but I would keep in touch with him and when they were available I would notify him. The war was not over, and the Navy was not turning that equipment loose at that time.

He explained that the Chinese Government wanted them to carry cargoes up the small rivers, and they could drop the ramp, due to the fact that they had no developed ports along the majority of their streams. They could drop the ramp at any congested spot, and the coolie laborers would carry the cargo and distribute it.

We went over the list of the engines that were for sale at the Maritime Commission, and he asked me to try to work out a deal or give him the information where
21 he could get a wholesale price on those engines by taking a large number of them to be shipped export.

We went into the automobiles, and he said he would like to have 300 of those.

After I found out what they needed, what they wanted, and what they wanted me to do was to get them solely information and keep them informed on what was coming up, what was available here out of the different surplus agencies, and forward it to them by phone and see what kind of prices could be worked out on it.

We later went into the fee, and they asked me to submit them a fee. I submitted them a price of 5 per cent fee on everything they contracted to purchase. I was to pay my own expenses, asking them for no advance. I was to be

paid only on the equipment or material that they signed and contracted to purchase.

I think that pretty well covers that.

By Mr. Bress:

Q. Was any statement made by Judge Nolen at that time in Mr. Robinson's presence as to his view of the reasonableness of the proposal?

Mr. Dunn: I object to the question, Your Honor. Judge Nolen is not a party to this suit. He is not before the Court.

The Court: The question is whether it was done
22 in the presence of Mr. Robinson.

Mr. Dunn: Pardon me, Your Honor.

The Court: Proceed.

The Witness: After I had submitted them the fee arrangement, Nolen said—he says, “Is that all right with you, Henry?” which was Robinson.

And Robinson says, “Well, it suits me.”

He says, “How about you?”

He says, “Well, nobody could make us a fairer proposition than Mr. Carroll has made here, agreeing to stand all his expenses and only agreeing to be paid for what we purchase.”

By Mr. Bress:

Q. Tell us what, if any, statements were made to you at that time by Mr. Robinson or by Mr. Nolen in Mr. Robinson's presence with respect to who was to purchase the surplus and upon which your fee was to be computed?

A. The question came up by Mr. Robinson. I asked if they were going to purchase this in the name of the Chinese Government or whose name they would purchase in.

He said, “Well, we will purchase it in our own names, or we are forming a corporation, or just about have one, a corporation, completed. We may take title to that in that.”

I said, "Well, gentlemen, do I understand you correctly? Am I dealing with your corporation or the Chinese Government, or are you two men making this agreement with me and are responsible for my fee?"

23 Robinson explained that he and Nolen would own all the corporation, if they took anything in the corporation's name, and they would be personally responsible for the fees, regardless of what name it was taken in.

Q. Was there any discussion of whether or not this arrangement should be reduced to writing? A. No. The question came up of reducing it to writing if the Chinese Government took it or their corporation took it, but they had come to me so highly recommended. Nolen informed me up there that night that he had been requested by President Roosevelt to attend as one of the members of the San Francisco Peace Conference. He carried the title of Judge. He carried it on his card. He told me about all his connections here. Robinson told me about his connections and the Judge's connections.

I said, "If I am dealing with you two individuals, we need no contract other than our verbal contract with all of us together."

And they said, well, that "We are absolutely responsible to you for anything that we purchase or contract to purchase."

Q. In their own names, as you have explained? A. In their own names.

Q. Or in the name of this corporation or Chinese Government? A. And as individuals.

Q. About what time did this conference conclude on this date? The date, I take it, you said was February 20? A. Twentieth. It was close to one o'clock, I presume.

Q. Will you tell us what, if anything, you did first toward performing your part of this arrangement? A. The next day I visited the Maritime Commission Surplus Department, which was in the Riggs Bank at Fourteenth and Park Road, Northwest.

I met Mr. Gorman. I met Mr. Clark. I met several of them and talked to each one of them, told them that I had a client that was interested in a large number of engines for export.

We went over the list, figured the prices on them, and I asked if there was any additional stuff that they knew of that was coming up where we could get a large volume of engines at one time.

By Mr. Dunn:

Q. Whom are you talking to now, Mr. Witness? A. I was talking to Mr. Clark.

By Mr. Bress:

Q. Mr. Clark of the Surplus Division of the Maritime Commission? A. Of the Maritime Commission.

Q. Very well. You mentioned Mr. Gorman and
25 Mr. Clark. Did you know their respective titles at the Maritime Commission on February 21, 1945? A. Mr. Gorman was Assistant Director and Mr. Clark was Sales Manager for the Engine Division.

By Mr. Dunn:

Q. Mr. Gorman was Assistant Director of what? A. Of the Surplus Division.

By Mr. Bress:

Q. And that division, I take it, had a number of separate component units, and one of them was engines, and Clark was head of the engine group? A. That was right.

Q. Now, you mentioned that you went to the Maritime Commission. May I ask you whether or not you had some authorization of license to appear before the Maritime Commission, or permit, as they call it? A. I had.

Q. I show you here a document dated January 6, 1945, signed by A. J. Williams, Secretary of the United States Maritime Commission, and ask you whether or not this is the permit that was issued to you (handing a paper writ-

ing to the witness?) A. That is. That was issued at Mr. Clark's request in January, 1945.

26 Q. State whether or not this permit was in effect during the entire period of your dealings with the Maritime Commission in connection with the engines which are the subject matter of this suit. A. It was.

Q. Was this ever revoked? A. No.

Q. Will you keep your voice up and talk a little louder, please? A. I've got a cold.

Mr. Dunn: No objection.

Mr. Bress: Would Your Honor like to see this?

The Court: That is all right; proceed.

(Paper writing referred to was received in evidence as Plaintiff's Exhibit 1.)

Mr. Bress: May I read it, Your Honor?

The Court: Yes.

* * * * *

27 Mr. Bress: "From A. J. Williams, Secretary of the Maritime Commission, to Messrs. Brierley and Gordon"—meaning Gorman—

"Upon presentation of this letter by Mr. Russell James Carroll, who has filed an application to practice before the Commission, you are authorized to discuss with him matters officially before the Commission involving ship repairs, salvage, and surplus materials.

"If the application of Mr. Carroll for admission to practice is rejected by the Commission, the authority conferred by this letter ceases, and it shall be the duty of Mr. Carroll to return this letter to me. Prior to conference Mr. Carroll should be required to state that he has not been advised that his application to practice has been rejected by the Commission. You may verify such representations with the Secretary's office.

"(Signed) A. J. Williams, Secretary."

By Mr. Bress:

28 Q. Was your application to practice ever rejected?

A. No, sir, not to my knowledge.

Q. Following your conferences on February 21, as you have outlined them, will you state whether or not you then had any communication with either Robinson or Nolen in the presence of Robinson? A. Yes. The next day, at the Roosevelt Hotel——

Q. By the next day, you are referring now to the 21st?

A. To the 21st of February.

Q. All right, sir. Proceed. A. And I explained to him the information that I had gotten at that time.

* * * * *

A. The men that I was talking to were Judge Nolen—James Nolen—and Henry Robinson, at the Roosevelt Hotel.

Q. On February 21? A. On February 21.

Q. And this was after your trip to the Maritime Commission? A. After my trip to the Maritime Commission.

Q. Very well. Now, is this conversation to the
29 extent that Judge Nolen was involved in it in the presence of Robinson? A. It was.

Q. Very well. Now, tell us what it was. A. That conversation that day just consisted of the information that I had obtained that morning and that there were certain engines available. There was a possibility of more of that type coming through, and I advised them that I thought in the near future that we could take care of all of their wants, for them to keep me informed on what they wanted, and I would keep them informed on what information I had picked up from the surplus office.

Q. What kind of engines were discussed on February 21, both at the Maritime Commission and with Messrs. Robinson and Nolen? A. Atlases, 400 horsepower, used Superiors, new Superiors, 320 horsepower Atlases, and there was one or two other makes in there that they were inter-

ested in, although there was Enterprises and Clarks, and Cooper Bessemers, and there was a large supply of engines, but they were interested mainly in the Superiors and Atlases at that time.

Q. Was there any discussion at that time, February 20 or 21, with respect to Continentals? A. No. The only discussion at that time which would bring in the Continentals—there was some small Budas, which was a Diesel engine, and there was several various makes of gasoline engines, and the Continental was part of them.

Q. I ask you one more question to get this point clear. On February 20 or 21 was there any limit placed on the number of engines that they would buy, or did they specify with certainty that they would buy only this type and no other? A. No, there was not a limit placed on them. Their remarks were that they would take all of one kind of engine if they could get them cheap enough.

* * * * *

31 By Mr. Bress:

Q. Following February 21, will you state what your recollection is as to when Messrs. Robinson and Nolen left town and left the matter in your hands to work on further? A. The last time I saw them was on February 21, on that visit. They informed me that they were going out that day.

Q. From February on for the next several months will you tell us what you did? What communications did you have? With what degree of frequency did you communicate with Nolen or Robinson in reporting on the information which you say you were to gather for them? A. Well, I visited the Maritime Commission offices once or twice, three times some weeks. I was there at least twice every week. Any information that I figured they were interested in I forwarded to them by phone immediately.

During the month of March we talked about the scout cars, about the automobiles that were for sale by the

Government, at that time the Treasury Procurement, and I told Robinson the information that I had, that there was 1500 of them at Cleveland, I didn't know what price, and that they had not set a price on them, and asked if he and the Judge would get together and inform me about a price that they thought that they could pay for them.

Robinson called me back a day or two later that I
32 inspect the cars, which were at the Lordstown Ordnance Depot, about 30 miles out of Cleveland, Ohio, and report to him when I arrived back in Washington.

I did. I got all the data on them, told him what the cars cost to construct. My recollection is, I think, it was around \$4900.

After phoning him that information, he asked if I would proceed to Cincinnati and try to purchase 300 of them at \$1,000 apiece.

Q. Do I understand, Mr. Carroll, that you went to Cleveland at his request? A. At his request.

Q. And the information which you say you passed on to him, with respect to the cars and the condition of the cars at the Georgetown Ordnance Depot, was information obtained by you at Cleveland? A. At Cleveland, at the inspection. That is Lordstown, not Georgetown.

Q. After making that report there was some discussion, as I understand it now, about some other material at Cincinnati? A. The Cincinnati office handled the sale of that whole Ohio district and part of Kentucky, Indiana, Illinois, and whatever purchase was made, it had to be made through the Cincinnati office.

33 Q. Did you go to Cincinnati? A. I went to Cincinnati.

Q. At whose request? A. At Mr. Robinson's request.

Q. And did you report to him? A. I reported to him my stay there and the information that I found out, that they had not worked out their sales plan at that time, and after talking to several of the men, different people in authority there, the last conference was with the director or the head of the office, a Mr. Shell—

Mr. Mr. Dunn:

Q. Mr. Shell, S-h-e-l-l? A. Shell, that is right, and he informed me that up until the time that they had decided just what they wanted to do with them, they were open for propositions. So I verbally submitted him an offer of \$1,000 a car for 300 cars, which was the request that Mr. Robinson had made of me, to make the offer of a thousand dollars a car for 300 cars.

* * * * *

37 Q. Now, following the month of March and the month of April, state with what degree of frequency you had communications with Messrs. Nolen and Robinson. I am confining any discussion with Nolen only to any discussion you have have had with him in the presence of Robinson. A. That is March and April?

Q. That is correct, following the Cincinnati and Cleveland trips. A. Well, during that period I had dropped them several short notes, dropped Robinson and Nolen—
at their offices, and talked to Robinson, possibly
38 twice a week, about different items, most of them pertaining to engines that the Maritime Commission had for sale and engines that were coming up.

I was informed by Mr. Clark in either the last part of March, which I think it was the last part of March, or the first of April, that the Navy was about due to turn over several hundred Continental engines to them, and when those engines were turned over for disposal, he would let me know when the price was figured out, their sale. He would let me know about it.

Q. Now, Mr. Carroll, did you have any letter correspondence with either Robinson or Nolen during the period of March, April, and May, and if not, state what form your communications with them took? A. Practically all our communications was over the telephone. Sometimes when I got in late I would write a short pencil note and drop it in the mail, so it would be in their office the next

morning. If I didn't get in before 5:30 or 6 o'clock I knew I couldn't catch either one of them at their office, so I would just make up a pencil note and drop it in the mail for their information.

Q. Did you keep copies of those pencil notes that you sent them? A. No, I did not.

Q. Now, when you say these calls were by telephone, do I understand they were long distance calls?

39 A. Long distance calls.

Q. Calls to New York? A. Yes, sir.

Q. Have you made any recent efforts to locate the number of the long distance calls which you made during this period we are discussing to New York, and have you been able to obtain the records on that? A. I have talked to the telephone company and asked if I could get that information, and they asked what year it was and during what period it was, and when I informed them, they said they did not keep those records that long, that they did not have that information available.

Q. Now, after Mr. Clark informed you about the prospect of the Navy to declare Continental engines as surplus—At this point, may I ask you this, as background, so that the jury will understand?

Was the Maritime Commission designated by Congressional authority as the sole agency for the disposition of marine surplus? A. They were.

Q. So that Navy surplus material consisting of marine items were not disposed of by the Navy itself? A. That is right.

Q. So that when you testified a few moments ago that Mr. Clark told you that the Navy was going to
40 declare surplus, will you explain to the jury what you mean by that? How would that enable the Maritime Commission then to enter the picture and dispose of it? A. Well, my understanding is that the Navy, the Army, and any agency, Government agency, that may have, or at that time had, marine equipment at that time made a

declaration that they had so much surplus, and that was sent to the Mairtime Commission. Sometimes it took a month or six weeks or two months to get all the papers cleared on it, which was the case, I think, on these Continental engines.

We knew for a month or six weeks that they were coming, but the papers had not all cleared at that time, and the Maritime could not sell them until they had complete authority, when the papers had all cleared, giving them authority to dispose of them.

Q. So the marine engines of the Navy or any other agency were disposed of through the Maritime Commission? A. That is right.

Q. These Continental engines are gas engines, are they? A. They are gasoline engines.

Q. They are small size engines or large engines? A. They are 165 horsepower.

Q. When you learned that they were coming to the Navy what did you do about notifying Messrs. Nolen and
41 Robinson about their availability? A. I talked to Robinson on the telephone, told him I had information his engines were coming up, and would possibly be 15 to 30 days before they cleared.

Q. This conversation was held when, approximately? A. It was held around the last of March, the first of April.

Q. All right. Go ahead, sir. A. And he says, "Well, we are very much interested in those engines. That is an item that we can use, and how many of them can you get?"

I said, "Well, to my looks of things, there will be over 200 of them."

Q. You told him that? A. I told him that, and he says, "Well, we would like to take all of them, everything they have in that type of engine."

Q. Now, did you pursue the matter of these Continentals thereafter, and if so, state what you did and to what extent you advised Mr. Robinson about it? A. On each visit to the surplus office I inquired about the engines, if

they had cleared yet, and I think it was possibly around the middle of May——

Mr. Dunn: Who is the witness talking to on this visit to the surplus office?

The Witness: Mr. Clark and Mr.—well, Mr. Clark
42 on this occasion; mostly Mr. Clark.

* * * * *

A. I think it was around the middle of May that the papers finally came through on the Continental engines.

Q. When you say the papers came through at that time, will you state whether or not that was followed by any publication of the Maritime Commission regarding these engines? A. Yes. When the declaration came through the Maritime Commission included them in their sales—Maritime Seller is the term they used for it.

Q. Was that a sales bulletin published? A. That was a sales bulletin that was published.

* * * * *

43 By Mr. Bress:

Q. You know they were published in the bulletin and you saw them? A. I did.

Q. Do you know the price at which they were published? A. \$910 each.

Q. State what, if anything, you did in informing Messrs. Robinson and Nolen with respect to the price on that item.

A. When those engines were finally available I talked to Mr. Clark in his office——

Q. In his office? A. In his office.

Q. By phone or in person? A. No; in person. I proceeded to his office.

Q. After leaving him, I went in and talked to Mr. Gorman, told him I thought I had an outlet for all of the Continentals to go to China, and I am pretty sure at that time that I showed Mr. Gorman Judge Nolen's card with the Chinese paragraph on the back of it, and told him I had Robinson's card, too, at that time——

Q. Did he have Chinese on the back of his? A. No, he didn't have Chinese on the back of his.

Mr. Dunn: Pardon me. When is this conversation taking place? What date, about?

Mr. Bress: This is after April.

* * * * *

Q. When was this conversation with Clark? A. This was somewhere around the last of May or the first of June.

* * * * *

A. And I inquired if all of these engines were bought for export could they be purchased at a lesser figure. At that time the war was still on. Gas was still rationed.

In several conversations that took place in Mr. Clark's office I went there, and the approximate middle of June we discussed these engines and the possibility of exporting them—these Continental engines, along with some of the larger engines.

Q. May I interject at this point and ask you, during this period up to the time you were discussing price for the Continental engines and extending into the middle of June, during the period from March until June, what were you doing with respect to the Atlas and Superior engines? Were you getting any information on those and passing it on to Mr. Robinson? A. I was getting information on those engines each time that I visited the Maritime offices.

Q. I think you have already said how often you visited there. State with what frequency you passed on that information to Mr. Robinson. A. Not less than twice a week, and sometimes it was three and four times. In fact, there was days we had two or three phone conversations during the period of 10 or 12 hours.

* * * * *

By Mr. Bress:

Q. You were speaking, Mr. Carroll, in the last question, with respect to the matter of the price on the Continentals.

State whether or not there was a change in that price following your discussion of the wholesale purchase with the Maritime Commission. A. There was a change. In the last conversation with Mr. Clark he said he would look with favor upon a \$750 price, provided my clients came in with a letter of intention accompanied by a cashier or certified check for 10 per cent of the amounts of the different items.

Q. Did you pass that information on? A. I passed that information on to Mr. Robinson that same day. He
46 informed me that he and the Judge would go over it and possibly would do business in a few days.

Q. I think you mentioned this was about the middle of June? A. Somewheres right around the middle of June, yes.

Q. Do you have any knowledge whether or not Messrs. Nolen and Robinson came to Washington shortly thereafter? A. They came to Washington on the 23rd of June.

Q. Did you see them on that occasion? A. No, I did not.

Q. Did your arrangement with them contemplate in any way that you make the deal for the purchase or that you only furnish them with information? A. I had no authority to make any deals for them. My whole agreement was to keep them advised, hunt the equipment for them, and give them the prices and try to make whatever arrangements would be satisfactory to them.

Q. On June 23, as of that date, state whether or not you had given them information of such a nature that the deals could be closed with the Maritime Commission? A. I had prior to that time given them the information and told them, explained to them, what the engines would cost, what was necessary in the way of certified checks, which they brought with them.

Q. Do you know of your own knowledge or from anything that Mr. Robinson told you that on June 23
47 they did close the deal with the Maritime Commission? A. They closed a contract—

* * * * *

A. And Mr. Clark informed me about it. They had purchased 20 used Superior engines, 12 Atlas engines, and 6 new Superior engines, putting up checks for twenty-two thousand, which was 10 per cent of the part of the Atlases, the new Superiors, and the used Superiors, and they put up a check for \$5,800, which was the price of the three Atlases that they bought separately.

Q. Mr. Carroll, did you submit any special considerations to the Maritime Commission as to the reason why the price for these Continentals ought to be reduced if the sales were made to your clients? A. Yes. I submitted to

48 them that these engines, if purchased by my client, who was a representative, or claimed he was a representative, of the Chinese Government—that the engines would be shipped to China and they would be an export item, and with the rationing of gas in the United States, that they possibly would be hard to sell here, and that they were needed in China, and China was one of our allied nations, and for that they should be sold at a lesser price.

Q. I show you a document marked, "Surplus Property List No. 19," and ask you whether or not these Continental engines that you talk about are referred to in that list (handing a document to the witness). A. They are referred to as Item 49 on page 9 of this.

Q. Is it a fact that this surplus property list shows a release date on June 10, 1945? A. Yes.

Q. Is it a fact that that release date shows no price for the item? A. Yes.

Q. Is that correct? A. That is right.

Q. Does this show the location of the engines, where they might be inspected? A. Mechanicsburg, Pennsylvania.

Q. State whether or not at some time shortly after June 19 you had any communication with Mr. Robinson with respect to a proposed inspection of these engines at Mechanicsburg. A. In a phone conversation with Mr. Robinson, he requested that he be allowed

49

to inspect these engines, and asked me to make that request of Mr. Clark, of the Maritime Commission.

Q. And did you make such a request? A. I made such a request, and Mr. Clark sent a telegram.

Q. To whom? A. To the officer in charge at the Mechanicsburg Depot.

Q. Giving consent to an inspection by whom? A. By Mr. Henry Robinson.

Q. You know of your personal knowledge that such a telegram was sent? A. Well, I know it was dictated.

Q. Was it dictated in your presence? A. It was dictated in my presence.

Q. And a copy of that should be in the Government file? A. It should be, yes, sir.

Q. Do you know whether or not Mr. Robinson actually went to Mechanicsburg at or about this time pursuant to that authorization to inspect and made an inspection?

A. In a phone conversation after his return, or
50 several days thereafter, he told me that he had looked the engines over, they looked good, he was well satisfied if he could get them, or if I could arrange to get them at that price.

Q. I show you now, Mr. Carroll, United States Maritime Marine Surplus letter, dated July 1, 1945, and ask you whether or not on page 16 of this publication——

Mr. Dunn: What are you referring to now, Mr. Bress?

Mr. Bress: July 1, 1945, United States Maritime Commission Surplus letter, published on that date.

By Mr. Bress:

Q. —whether or not these very same Continental Commando gas engines to which you have been referring in the first testimony appear here and whether or not for the first time the price appears in this document (handing a document to the witness). A. They do.

Q. State what the published price is for those engines in that document. A. The published price retail is \$1515; wholesale, \$910 each.

Q. And that is the same amount that you had, I think, testified that you had discussed with Mr. Clark? A. \$910.

Q. During the middle of June, I think you said? A. Yes.

51 Q. Getting now to the trip that Nolen and Robinson made here, I think you stated it was June 23, after everything was all set to make the deal, and at the recess you testified what deposits were made on the Superiors and the Atlases.

Do you know whether or not on that date any negotiation occurred with respect to these Commandos and whether or not the price had been reduced? A. The price had been reduced to \$750, and they put up a 10 per cent deposit check——

* * * * *

A. A deposit of 10 per cent was put up in the amount of \$18,750.

52 Q. Which turns out to be 10 per cent of \$187,500, which is 250 engines at \$750 each? A. That is correct, sir.

Q. How long after your discussion with the Maritime Commission, furnishing them the considerations you have already testified to, as to why the price should be reduced, did they reduce the price? A. Their price board met along in June, about the time that the other engines were purchased.

Q. I am asking you, in point of time, how long after the occasion when you mentioned that there was gas rationing, that this would be a purchase of a large quantity, and that they would likely be shipped abroad. How long after that did you learn that they had approved a reduction in price, and, if so, who did the approving? A. Well, it was possibly from the middle of June up to the 23rd of June.

Q. Somewhere in that period? A. In the period.

Q. Do you know who approved the reduction in price? A. Mr. Clark and, I guess the price board.

Q. The price board? A. Yes.

Q. Can you tell us what the price board is in the
53 Maritime Commission? A. The price board was—

I think it was five men or five of the heads of the different divisions. When an item was moving slow, why, they met, and if they looked like they could get rid of it by a smaller price or had an offer at a lesser price, they met and decided whether to cut the price or not.

Q. How soon after June 23 did you learn that these deals had been closed with the Maritime Commission?
A. Just a day or two; possibly two days.

Q. Immediately upon learning it what you do? A. I called New York and talked to Mr. Robinson.

Q. Can you tell us the date, if there is anything special that fixes the date in your mind? A. That was on June 26.

Q. On June 26 state the substance of your conversation with Mr. Robinson. A. I informed him how pleased I was that they had finally closed up on these engines; that we had been working since February and this was the first transaction that had been agreed to where they had put up money; and informed him that my duties had been performed and, being they closed up on them, when could I look forward to my fee being sent to me.

He said he would have to talk to the Judge, Judge Nolen, about that; that Nolen wanted to make me some kind of a proposition on some of the big engines at a lesser
54 fee; and I informed him then that my fee was 5 per cent; that he and Nolen had agreed to it.

I said, "Is my fee satisfactory to you?"

And Mr. Robinson informed me that it was, but that the Judge had made several trips down here and was supposed to have interceded with some of his political friends to try to get a lesser price than what we had lined up on this, and that he thought that I should give them the benefit of his expenses, and so forth, down here, at a lesser fee for some of the big engines.

Q. Was any question raised about the fee on the Continentals? A. There was no question raised other than the fee on one or two of the big engines.

Q. With respect to any reduction of your fee on the big engines, did you or did you not agree to reduce your fee? A. No. My fee was set up at a 5 per cent fee on what they purchased.

Q. Did Mr. Robinson agree at that time that you would be paid? A. He agreed at that time that I would be paid and that the fee was satisfactory to him, but—

* * * * *

55 But he and the Judge were partners and he would talk to the Judge about it.

By Mr. Bress:

Q. As of that time did you learn the name of the corporation that these two men had formed and whether or not they were making the purchases in their own names or in the name of the corporation? A. I learned that the corporation that they spoke of, possibly in February, was the American Pacific Company, and that they were taking title or making this contract in the name of the American Pacific Company.

Q. Did Mr. Robinson make any statement to you as to whether or not he was president of the corporation and whether he and Nolen owned the entire corporation? A. When I questioned the corporation he said, "The Judge and I own all the stock in it, and you have no worries about your fee. We are personally responsible, as we agreed in February with you."

Q. That is June 26. On the following day, June 27, 1945, did you write a letter to Mr. Robinson by registered mail, and is that a carbon copy of your letter with a registered receipt for sending it (handing a paper writing to the witness). A. It is.

* * * * *

56 Mr. Bress: I offer this in evidence as Plaintiff's Exhibit No. 2.

* * * * *

The Court: The Court will permit you to read the whole letter.

(The letter referred to was received in evidence as Plaintiff's Exhibit 2.)

* * * * *

(The letter above referred to, Plaintiff's Exhibit 2, was thereupon read to the jury by Mr. Bress.)

By Mr. Bress:

Q. Following the writing of that letter of June 27, state what was your next contact with Mr. Robinson. A. He and Judge Nolen came to town on July 23—

Q. Before you go into that, this should precede that immediately.

In the last sentence of your first paragraph of
57 this letter, you state, in substance: "If no other governmental agency takes over these Continental Commando engines by July 22, our deal can be completed."

Will you state what was the basis for that statement in your letter? A. The basis for that statement in the letter was that the Maritime Commission felt before they sold these engines at \$750 they should be advertised, which was one of their rules, for 30 days, to allow these different agencies additional time to come in and purchase, if they wanted, and if the agencies did not exercise their priority by the end of the 30-day period, this transaction could be closed up, and Robinson and Nolen could purchase all the Continental engines.

Q. You informed them in this letter that they would have to wait until July 22 before that deal could be closed? A. That's right.

Q. On July 23 did they come to town? Have you checked July 22 by the calendar at my request to tell us what day

of the week that was? A. July 22, which I remembered was the expiration date of that 30-day period, was on a Sunday.

Q. Did they come to town on the next day, on the 23rd? A. They came to town, to my knowledge, which was the next day.

Q. Will you state what happened on that day?
58 A. They closed out their agreement with the Maritime Commission—

Q. By "closed out" you mean what? A. They signed an agreement and purchased 125 of the engines, which was, I think, all that was remaining—no. I am getting ahead of my story in there a little bit. They purchased the whole 250.

Q. Did they place the deposit of \$18,750? A. And they placed a deposit of \$18,750.

Q. What contact did you have with them on July 23? A. I called them at the hotel, and Judge Nolen answered the phone, and made an appointment for him and Mr. Robinson to meet me at 11 o'clock the next morning, suggesting that I phone him first before I came down.

I called, and Mr. Robinson answered the telephone, said the Judge had to go out on a little business matter, and call him back in 30 minutes.

I called later, and he said he had not located the Judge yet, but he was positive he would be there by 12 o'clock, and for me to come on down.

Q. Did you notify Mr. Robinson what was the purpose of your desire to speak with them? A. I was looking for my fee payment, my pay for the work that I had done, which Mr. Robinson understood.

Q. Had you had any conversation with them as to
59 how much that was? What was the total amount of their purchases? A. Was 5 per cent of the total of their purchases.

Q. What was the amount of the purchases? A. Which was four hundred three thousand and some odd dollars.

Q. Two hundred fifty dollars? A. Two hundred fifty dollars.

Q. He said call back in 30 minutes; the Judge will be back. Then what did you do? A. I caught a taxi and proceeded to the Roosevelt Hotel.

I met Robinson. He said he had not located the Judge, and that he had a little luncheon engagement and that he would possibly be tied up about 30 to 45 minutes, and for me to contact him again at one o'clock, which I did; and he informed me then that he had not been able to locate the Judge.

I called him around 1:40, at his request, and he told me that he had not located the Judge; that the Judge possibly was in some business conference and it has taken a whole lot longer than was expected. He asked me to call back about 2:15 or so.

I called him at 2:20. He said he had not located the Judge and for me to call him around 3 o'clock.

I called him at 3 o'clock. I found out from the hotel that they had both checked out at 2:30, ten minutes
60 after I had talked to him the time prior, and Robinson had asked me to call him again at 3 o'clock.

Q. That was on July 24? A. July 24.

Q. Have you ever seen Judge Nolen since then? A. No, I have not.

Q. Have you seen Robinson since then? A. I have seen Robinson on two occasions: I know; talked to him.

Q. When was the first occasion after they got out of town? A. I met him in the Maritime Commission office some time within 20 to 30 days of this, and possibly during the month of August.

Q. Did you have any conversation with him about his indebtedness to you at that time? A. Yes.

Q. What did he say? A. He agreed that they owed it, that the Judge was putting up the money, and they had made these payments on these engines, and that they were a little shy.

By the Court:

Q. What explanation, if any, did he give for leaving town without seeing you on the 23rd of July, if that
61 was the day? A. When I talked to him, which was possibly 30 days or 20 days after them getting out of town, he said the Judge rushed in and wanted to catch the 3 o'clock train, and he was bound by the Judge, due to the fact that Nolen was influential, both financially and politically; and they caught the 3 o'clock train and went back to New York to make a so-called business appointment for the Judge back there.

By Mr. Bress:

Q. Did they leave any message at the hotel for you? A. There was no message. There was no explanation.

Q. Was this meeting between 20 and 30 days later, when you ran into him at the Maritime Commission, by accident or by appointment? A. That was by accident.

Q. State again what he said about admitting his responsibility to you for this compensation. A. He admitted that they owed me and said he would like to pay me, but they were short of funds, and that the Judge was putting up most of the money.

Q. And thereafter did you receive any payment from either Robinson or Nolen? A. I never received any payment whatsoever from him.

Q. Did you file your suit in this case that we are now trying on August 29, that next month? A. I did.

62 Q. Does this show the shipyards, or one of them, that you built on the West Coast (handing a document to the witness)? A. I did.

Mr. Bress: This is the Oakland, California, edition of November 26, 1941, of the Oakland Tribune.

By Mr. Bress:

Q. Does this show your photograph on the day you retired or resigned?

Mr. Dunn: What is this?

Mr. Bress: It shows this man's complete experience in the field of marine engineering.

Mr. Dunn: I object to it, Your Honor.

The Court: The Court thinks it is admissible for this reason. The Court thinks the plaintiff has a right to show he is not simply an irresponsible person who has made up this story, but that he is a responsible man, and for that reason it is admissible, if it does show that. I do not know what it shows.

By Mr. Bress:

Q. Mr. Carroll, you testified about your waiting until the yard was completed and the first ship was launched before you resigned from your job as engineer for these plants out there. A. Yes, sir.

63 Q. Is this the Oakland Tribune for October 8, 1942, on the front page showing "Richmond Shipyard Developer Resigns as First Hull is Launched"? Is that what you refer to (handing a document to the witness)? A. Yes, sir.

Q. Are these two photographs of November 26, 1941 and September 5, 1941, representative of the shipyards that you designed and built (handing documents to the witness)? A. That is correct.

Mr. Dunn: Are you offering those in evidence?

Mr. Bress: I am offering these in evidence.

Mr. Dunn: Objection.

The Court: Objection overruled.

(Documents referred to were received in evidence as Plaintiff's Exhibits 3, 4, and 5, respectively.)

Mr. Bress: Here is the resignation after the first ship was launched, and here are the shipyards (handing documents to the jury).

* * * * *

By Mr. Bress:

Q. Did Mr. Robinson ever reply to your letter of June 27, 1945? A. No, he did not.

Mr. Bress: That is all. You may cross examine.

64 Cross Examination

By Mr. Dunn:

* * * * *

Q. As a matter of fact, you do not know whether they purchased them? You do not know whether they made a contract with the Government for their purchase? All you know is that they put up a deposit for the purchase of these various engines that you set forth in your complaint? Is that a fact? A. I know that they agreed to, by looking at the contract or the agreement that they made.

Q. What contract? A. I know from Mr. Clark's conversation with me when he informed me what they had purchased.

Q. What contract are you referring to that you saw? A. It is not a contract. It is just a form that is filled out—

Q. It is a deposit; is that right?

Mr. Bress: Let him finish his answer.

The Witness: It is a deposit for so much equipment.

65 By Mr. Dunn:

Q. All right, sir. Now, you have testified here that your occupation is that of a structural engineer; is that correct? A. That is right.

Q. Were you a structural engineer from 1942 through 1945? A. I have been a structural engineer ever since I got out of college.

Q. Let us put it this way. Were you working as a structural engineer between 1942 and 1945? A. I was working for myself.

Q. You were working for yourself? A. Yes.

Q. As a construction engineer? A. Yes.

Q. With reference to this alleged contract that you claim was made between yourself and Nolen and Robinson, were you working for them as a construction engineer? A. No.

Q. Well, now, what was your business on behalf of Nolen and Robinson? A. My business on behalf of Nolen and Robinson was to get them information on equipment which was for sale which they wanted.

* * * * *

66 Q. You were in the brokerage business. From 1942 to February, 1945, you were working for yourself as a broker; is that right? A. A broker and an engineer.

Q. But for this purpose, for representing Nolen and Robinson, you were representing them as a broker? A. I was representing them to get them information, not as a broker. I had no authority to close deals or obligate them in any way.

* * * * *

Q. Do you recall, when you were asked in what capacity you were working between 1942 and 1945, what your answer to that question was?

Mr. Bress: Page, please.

Mr. Dunn: Page 1.

By Mr. Dunn:

Q. Did you say you were a construction engineer or did you say you were a broker?

Mr. Bress: Will you direct his attention to the specific questions and answers? I think that is proper.

67 By Mr. Dunn:

Q. You were asked:

"Question: In 1942 to February, 1945, where were you employed?"

And you answered: "By myself."

And the question was then put to you:

"In what capacity?"

Do you remember your answer to that? If I told you that your answer was that you were doing a brokerage business, would it surprise you? A. No.

Q. Then, you were in the brokerage business between 1942 and 1945, were you not? A. Yes. I am in the brokerage business now—that is——

Q. That is what I wanted to find out. You were not doing any work as a construction engineer between 1942 and 1945, were you? A. Yes; I did quite a bit of it.

Q. Where and for whom? A. I did it for myself.

Q. Were you employed by somebody? A. I did quite a bit of engineering on some of my own equipment.

68 Q. On your own equipment? A. Yes, sir.

Q. What equipment? A. Derrick boats, barges, tugboats.

Q. Did you own these derrick boats and barges? A. I did.

Q. Where were they? A. In Philadelphia Harbor.

Q. Were they there at that time? A. No—yes, they were there during 1942 and part of 1943.

* * * * *

Q. I show you Plaintiff's Exhibit No. 1, directed to Messrs. Brierley and Gordon, wherein it is shown that you are given authority to practice before the Commission for the purpose of discussing matters officially before the Commission on ship repairs, salvage, and surplus materials (handing a document to the witness).

Now, could I be admitted to do this same thing at this same time? A. I don't know.

Q. Was it something that only brokers or men in the structural engineering business could get? A. It refers to ship repairs in there, doesn't it? And it takes
69 an engineer to make a ship repair, or a mechanic.

* * * * *

Q. Will you tell the jury what this has to do with your acting for Nolen and Robinson for the purpose of getting information for them in their purchase of these various marine engines? What has this got to do with that? A. There was a ruling at that time—while the war was going

on they were watching things very close, and the different divisions, especially the Maritime Commission, was not supposed to recognize you unless you had been cleared through the Secretary's office.

* * * * *

73 Q. Now, did you have an office in the Investment
74 Building? A. I did.

Q. When did you first get your office in the investment Building? A. Somewheres in the spring of '43.

Q. Spring of '43? A. Yes, sir.

Q. You had a telephone there? A. Yes.

Q. What was the telephone number? A. National 2404.

Q. National 2404, and you stayed there how long? A. Until about May of '46; along in there somewheres.

Q. May of '46? A. Yes.

Q. And you continued to have a telephone until you left the Investment Building? A. The office carried on after I left.

Q. You testified here this morning that in 1942 you went into the business, in the engineer and construction field, for purchasers of surplus commodities before the Maritime Commission who were interested purchasers, both from this country and foreign countries. Was it necessary for you to have construction engineer experience in order to purchase marine engines? A. I don't quite follow you on that. You started that question—

Q. In your testimony on direct examination you did not say anything about being a broker, as you very definitely said in the deposition as I pointed out to you.

The Court: The question said that in this particular instance he was not acting as a broker. That is his testimony so far. If you are breaking it down, you can do it.

Mr. Dunn: I have pointed out to him his deposition.

The Court: He said broker, but he did not say he was acting as broker in this particular transaction, sir. He just testified that he did not.

Mr. Dunn: I am trying to get from the witness, Your Honor, whether it was necessary for him to have construction engineer experience in order to purchase these marine——

The Court: You asked him about the broker. He has testified up to this time that he was not acting as a broker in this transaction. You have a right to cross examine him and see if he was, if you see fit to do it.

Mr. Dunn: May I put this question to him, Your Honor?

By Mr. Dunn:

Q. Was it necessary in this transaction, in reference to Nolen and Robinson purchasing this equipment from the Maritime Commission, that you have structural engineering experience? A. Well, it was helpful. I don't think it was absolutely necessary.

Q. Now, getting up to the time that you first met Nolen and Robinson in 1945, do you recall whether it was the early part or latter part of February? A. It was on the 20th of February, if my memory serves me right.

Q. You talked over the telephone with John Light? Is that with whom you said you talked? A. No, I did not testify that I talked over the telephone. I said John Light talked over the telephone to Henry Robinson, in my presence.

Q. In your presence? A. That is right.

Q. And you also talked with Mr. Robinson? Didn't you testify that? A. I did.

Q. And an arrangement was made whereby you would see him at 10 o'clock that evening? A. An arrangement was made—I was introduced over the telephone by Mr. Light, and arrangements were made for me to call later and we would set a time for an appointment or conference.

* * * * *

77 Q. Will you explain to the Court and the jury just exactly what you were to do under this al-

leged agreement that you made with Nolen and Robinson in their hotel room? A. I was to furnish them with any information I could secure on items that they were interested in. The conversation this first night resolved around landing craft, automobiles, and marine engines——

Q. What were you to do? What was your part? What work were you to perform under this contract? What were you to do?

Mr. Bress: He is telling you.

78 The Witness: I just testified to that, I think. Are you listening?

By Mr. Dunn:

Q. Will you testify again to it? A. Yes, sir. I was to get them information and forward it to them on any items that they were interested in, which they may call me on and suggest that I look up for them. I was to get the prices, the location, find out as much as I could about it, where it could be purchased, and for what price. That was the extent pretty well of my duties.

Q. Was this information that you were supposed to get for them made available just to brokers or construction engineers by the Maritime Commission? A. No, I don't think so.

Q. As a matter of fact, that information was available to every citizen of the United States, was it not? A. I think there were ten or twenty thousand of those sellers advertised and went out each month, each time they were printed.

Q. In other words, ten or twenty thousand bulletins went out to these prospective purchasers, the people whom the Maritime Commission thought would be interested in such equipment? They went out, describing the various equipment that was for sale, the price which the Maritime Commission was asking, the location, and the quality of the particular equipment? That is a fact, isn't it?

79 A. Yes, that is a fact.

Q. So that you could not get any information from the Maritime Commission other than the information that was made available to some ten, twenty, or thirty thousand other people who were interested in the purchase of this various equipment; is that right? A. I was here on the ground and I was in the Maritime Commission's office several times a week. I got first handed information, which the people that were on the mailing list possibly may not get for a couple of weeks. That was the service that Judge Nolen and Robinson wanted.

Q. Well, was the basis of your agreement that you would get this information before it was sent out to other people, including Nolen and Robinson? A. It took some time to print the sellers, the pamphlets, and it took some time to mail them, and when I had that information, the day it was available they could have it that same day that it was available. Possibly, if they waited to get their mail, it may not arrive there for another week.

* * * * *

80 Q. Mr. Carroll, I understand from your testimony that the day after you had seen Nolen and Robinson at the Roosevelt Hotel you then went to the Maritime Commission on February 21? A. That is correct.

Q. Is that right? A. Yes.

Q. Now, whom did you see at the Maritime Commission on that day? A. I saw several of the different men that I knew, including Mr. Clark.

Q. You saw Mr. Clark and whom else? Can you give us their names? Did you see Mr. Gorman? A. Mr. Massey. I saw Mr. Gorman in that week. I don't know whether it was that particular date or not.

Q. You are sure you saw Mr. Clark that day? A. I am certain.

81 Q. What did you say to Mr. Clark? A. I explained to him about these clients that had——

Q. What did you say to him? Did you tell him the names of your clients? A. Yes.

Q. Whom did you say that your clients were? A. Nolen and Robinson, and I had both of their personal cards.

Q. Did you show him those cards? A. Yes.

* * * * *

Q. Did you say anything about the American Pacific Corporation? A. No, I did not.

Q. Did you say that you represented the National Chinese Government? A. I said that these men had a Chinese connection.

Q. You did not tell him that you represented the National Chinese Government? A. No, I did not.

Q. What else did you say to Mr. Clark, if anything? A. I went over the list of engines.

82 Q. Where did you get the list? A. He had it.

Q. That was in a list that Judge Nolen had in his hand the night before at the Roosevelt Hotel? A. The same list, yes.

Q. Judge Nolen had that list before he ever talked to you; is that right? A. Yes, that is correct.

Q. So that the equipment that you and Mr. Clark discussed that morning was the same equipment that was contained in the list that Judge Nolen had in the hotel room the night before? A. That list was, yes, but some of the questions that I was interested in was how many more of these motors were going to be declared surplus.

Q. Did he tell you that? A. And Mr. Clark looked over some of his records and gave me what information at that time that he had available.

Q. Was that available to the general public, or was that done only as a courtesy and favor to you? A. No; that had not been printed. It would have been available to the general public if they had gone and requested it.

Q. Well, were the Continental engines and the Atlas engines and the Superior engines listed in the publication which Judge Nolen had in his hand the night before
83 in the Roosevelt Hotel? A. No, sir.

Q. They were not? A. The Atlases, Superiors—a number of engines were in there, but the Continental engines had not come through at that time.

Q. They did not come through until the early part of June? Is that your testimony? A. I think I testified that they cleared in the early part of May.

Q. What did Mr. Clark tell you, referring to these files and records that you say he did refer to? What did he tell you with reference to the possibility of any engines coming out in the near future? A. He explained different items that were coming; also the list that Judge Nolen had and that he had; how many of them they had sold in the meantime; since the list had been published how many were left.

Q. You had been doing this type of work down at the Maritime Commission for quite some time, had you not? A. Prior to that, yes. My—

* * * * *

The Witness: My authority from the Secretary of the Maritime Commission was in January, January 12.

84 By Mr. Dunn:

Q. Didn't you know that it was the policy and firm regulation at the Maritime Commission that all information that was to be given out to any person would be given out to the general public all at one time? A. No, I did not know that.

Q. You did not know that? A. No.

Q. Is it your testimony that this information that you got from Mr. Clark on February 21 was not available to the general public? A. No; no. If the general public would have requested it, they could have got it the same as I did.

Q. I see. In these publications wasn't the type of engine described, the location of it, and the quantity that was available? A. The quantity that was available when that was printed. They immediately went to selling from it—

Q. They immediately what? A. They immediately went to selling from that sales bulletin that they put out. In possibly a week or two days or maybe three days after that bulletin came out all the engines one particular type would be gone.

Q. Was there any information that you could get—I am referring to plaintiff's exhibit—

85 Mr. Dunn: Is this an exhibit?

Mr. Bress: It has not been marked.

By Mr. Dunn:

Q. I am referring to this surplus property list. Was there any information that you could get from Mr. Clark or anything else in the Maritime Commission other than what was contained in this list here or the items shown on the list? A. Yes. There was always information after that was printed. There may have been some declarations.

Q. Declarations from where? A. From the different Government agencies where they would have more engines coming in.

Q. And were those declarations available to you? A. Verbally, yes—No; they were not available to me.

Q. In other words, you got that information from Mr. Clark or some other person in the Commission? A. Yes. As a general rule, I requested it when I was there. If they had 10 engines of one kind and they had sold five or six of them, I always asked them if they knew of any more that was coming; are any of the agencies going to declare some more surplus?

Q. Was it Mr. Clark that you dealt with exclusively or was there someone else that you dealt with in reference to securing this information? A. On the engines I dealt
86 with Mr. Clark. I dealt all around the Maritime Commission.

Q. On this particular transaction you dealt with Mr. Clark exclusively? A. When he was available.

Q. Well, now, when he was available. Did you deal with any other person than Mr. Clark? A. I dealt with Mr. Gorman. That is, I went down and talked with Mr. Gorman and told him what my interests were, but it was always necessary to either wait for Clark or pass up the information for that particular period. Clark was the only one that gave out—that knew the possible time that these different items would be available.

Q. He was the head of the department? A. He was the head of that department, yes, sir.

Q. How many times did you talk to Mr. Gorman after February 1 about these various engines? A. Either twice or three times.

Q. You talked with him twice? A. I am sure of twice, though.

Q. Twice or three times up until July 23, 1945, throughout the period that you are covering here? A. About these particular items, yes.

Q. You talked to him personally? A. Yes.

Q. Did you ever talk to him over the telephone?

87 A. Mr. Gorman?

Q. Yes, sir. A. I don't recollect talking to him. I don't recollect talking to him over the telephone.

Q. After February 21, after you had talked with Mr. Clark, how many times from that date until July 23 did you talk with Mr. Clark about these particular marine engines? A. I talked to Clark possibly 20 times, but I talked to him anywhere from eight to twelve times about these particular engines.

Q. You talked to him particularly about these engines eight to twelve times. Where did you see Mr. Clark? A. In his office.

Q. Was there anybody present except yourself and Mr. Clark? A. There was different people coming in and out. Once in a while he called in his assistant who kept the records, Mr. Massey.

Q. Who was his assistant? A. Mr. Massey.

Q. Did you ever talk with Mr. Massey? A. A number of occasions, yes.

Q. About this particular transaction, about these engines? A. Clark had called him in a time or two
88 and asked him questions in my presence.

Q. And did you get any information about these engines from Mr. Massey? A. Mr. Clark did and Mr. Clark related it to me. The three of us were standing there talking.

Q. But generally most of the information that you got you got from Mr. Clark? A. Yes, sir.

Q. Except for the three times that you talked with Mr. Gorman? A. Yes.

Q. After February 21, after you had discussed the availability of the Atlas, the new and used Superior motors, what information did you get from Clark or Gorman? A. I don't quite understand your question.

Q. You have sued here because you got certain information for Mr. Nolen and Mr. Robinson, and you are asking \$20,000 for that information? A. Yes, sir.

Q. Now, what information did you get from February 21 to July 23?

Mr. Bress: I object to the form of that question, which contemplates some *quantum meruit*. This is a suit on a contract.

Mr. Dunn: I will reframe it. Are you objecting
89 to it because I am taking in a multitude of——

Mr. Bress: I object to it on the ground that you are trying to argue your case on the question.

Mr. Dunn: He said he did not understand the question.

By Mr. Dunn:

Q. Do you understand the question now? A. I think so. Repeat it.

Mr. Dunn: Mr. Reporter, will you read that question about what information——

The Court: He wants to go over the services you are alleged to have performed between February and July 23.

Mr. Dunn: Yes, sir.

Will you read the question?

Mr. Bress: The Court has stated the substance of it. I have no objection to the question.

The Court: Counsel may not like my interpretation of the question. I do not know.

Mr. Dunn: Really, I did not hear you.

The Court: I said you wanted him to go over his alleged services between February and July 23.

Mr. Dunn: Exactly.

The Witness: The information that I received and forwarded on, as I kept touch two or three times a week, was how many engines were left, how many were available, what information I could find out on what was coming up, the different size, the prices, the locations.

By Mr. Dunn:

Q. But didn't Mr. Nolen and Mr. Robinson already have that information, Mr. Carroll? A. Not to my knowledge.

Q. Didn't they, on the night that you first saw them, have a copy of this surplus list? A. That is correct.

I will answer that a little clearer, as I answered it before. That list was put out approximately once a month. Maybe three or four items on that list were not available. Maybe they had been sold when I saw Judge Nolen and Mr. Robinson and made my agreement with them on the 20th of February. That list was possibly 20 days old.

Q. Did you know that Mr. Robinson and Judge Nolen were on this mailing list, among these ten to twenty thousand people who were being sent this information? Did you know that they were on the mailing list themselves A. Yes; they told me so.

Q. You knew that? A. Yes, I knew that.

Q. So that the information that you were giving them was the same as they were receiving in the mail from the Maritime Commission? A. No. I don't know—

91 Q. Let me see—

The Court: Let him finish the answer.

The Witness: I don't know how many times I have to explain that to you, sir—

By Mr. Dunn:

Q. But—

Mr. Bress: Let him finish.

The Court: Let him finish that answer.

The Witness: That particular bulletin that they had was possibly 20 days old, and while it had a list of engines in it, maybe 10 Atlases, and 2 of this, and 3 of that, and 100 of something else, it was necessary to check from day to day to see how many were still available, because the Maritime Commission were selling millions of dollars worth of engines and selling them every day, and this bulletin came out once every 30 days.

By Mr. Dunn:

Q. Would it be possible for a person who was interested in any particular equipment, any particular marine engine, for instance, after he had received a bulletin, to call up the Maritime Commission and find out whether it was available? A. Yes, he could have done it that way, but their reason for hiring me was I was here on the land, on the ground at all times, and could, when they were interested in something—all they had to do was call
92 me and I would run it down for them.

Q. As I understand your testimony, you are not claiming that you had authority to purchase these particular marine engines from Nolen or Robinson? A. I had no authority to purchase.

Q. You were not, therefore, to procure the purchase of these various marine engines from the Maritime Commission, were you? A. No, sir.

Q. Now, did I understand you correctly when you said that you visited the Maritime Commission one, two, or three

times a week after February 21? A. And prior thereto, yes.

Q. And prior to February 21? A. Yes.

Q. Were all of those visits in reference to this particular transaction here? A. No, sir.

Q. How many visits between February 21 and July 23 were on behalf of Nolen and Robinson? A. From eight to twelve times I particularly went there on the items that they were interested in.

Q. In other words, it was the same number of times that you saw Mr. Clark? A. On these particular transactions, yes.

93 Q. When did you say you went to Cleveland, Ohio, in reference to these scout cars? A. In the latter part of March and the first of April.

Q. In your letter of June 27, 1945, when you were referring to a trip to Ohio, was that the same trip that you took on these scout cars? A. No, sir.

Q. It was a different trip entirely? A. It was a different trip altogether.

Q. You also testified that you went to Cincinnati? A. That is correct.

Q. And you talked to Mr. Shell? A. Yes.

* * * * *

94 Q. Who was Mr. Shell? A. Mr. Shell was with the Treasury Procurement and the War Assets and had charge of the Ohio District for the sale of the scout cars.

Q. That was with the Treasury Procurement Division? A. That is right.

* * * * *

Q. Now, from February 21 up until July 23 you had numerous telephone conversations with Mr. Robinson long distance to New York? A. That is correct.

Q. Where did you call Mr. Robinson?

* * * * *

95 A. At his office.

Q. And where is that? Do you know? A. 120 Broadway, I think; somewheres in there.

Q. Did you know that the name of the company where he worked was the American Pacific Corporation? A. That was the corporation that he and Judge Nolen owned, yes.

Q. You testified you never sent him any letters during this time except the one on June 27, 1945? A. I did not testify to that.

Q. Except notes by pencil? A. That is right.

* * * * *

Q. Where was this plaintiff's letter here, Plaintiff's Exhibit No. 2, written from? A. From the office.

Q. From the office? A. Yes, sir.

96 Q. How was it, Mr. Carroll, that during all this period of time up until June 27, when you had this conversation with Robinson, and apparently there was some conversation about the contract, that you never wrote a typewritten letter during that period?

Mr. Bress: The conversation was on June 26 and the letter was June 27, and there was no question about the contract.

The Witness: All of our business was taken up over the phone, and outside of the penciled notes and the longhand notes that I had sent to Robinson, practically all his business with me and my business with him was over the long distance phone.

By Mr. Dunn:

Q. Except this letter here. What made you decide to write this in typewriting and keep a copy and you did not keep a copy of your penciled notes? A. I wrote that at the office. I always keep copies of letter that we write at the office.

Q. But you never wrote any letters from the office and kept copies of the other information you were sending them, did you? A. Because that was practically all tele-

phone or penciled notes, and the purchases had not been completed prior to that.

97 Q. Coming back for a moment to the night that this alleged contract was entered into, you did not know Nolen and Robinson? A. No.

Q. The recommendation that you have talked about was the recommendation that you have heard from Judge Nolen himself? A. From John Light.

Q. What did John Light tell you about Judge Nolen and Mr. Robinson? A. He knew them; told me they were high class men; that he had been representing them.

Q. When Judge Nolen told you that there was not any necessity for a written contract didn't you become rather suspicious that he told you he did not want to put it in writing? A. I don't of any testimony where Judge Nolen told me that——

Q. You testified that Judge Nolen——

Mr. Bress: He testified, on the contrary, that there was no discussion about any writing.

* * * * *

98 Q. Was there any discussion at all about whether the contract should be in writing or not? A. There was not, because, due to the fact that they personally guaranteed to pay the fee on any items that they agreed to purchase, a fee of 5 per cent.

Q. Didn't you raise a question, when they started talking about the Chinese Government, as to who was to be the principal in this case? A. I did.

Q. There was a question in your mind about it, was there not? A. That's right.

Q. And the question was whether it was going to be the American Pacific Corporation, whether it was going to be Nolen and Robinson, or whether it was going to be the Chinese National Government? A. I raised that question.

Q. There was a question in your mind whether it should

be in writing or not? A. There was nothing said about writing. I asked them who was the principal.

* * * * *

99 A. I asked them who was the principal, who was going to be the principal,—the Chinese Government, the American Pacific, or Nolen or Robinson—and Robinson and——

* * * * *

A. They explained, regardless of who purchased it or what name it was taken in, that my fee would be guaranteed personally by them.

Q. Didn't you feel that you would be more fully protected if you had a contract in writing, inasmuch as this deal would run into a considerable amount of money for you?

Mr. Dunn: Will you read the question, Mr. Reporter?

The Witness: I know his question. I had no doubt, with the advance information that John Light gave me, the caliber of the men after I met them, one of them claiming to be a Massachusetts Judge and told me his connections, that he had been invited to sit as one of the members of the Peace Conference at San Francisco—if their word was not any good, their paper would not have been any good.

* * * * *

100 Q. From February 20 to July 23 how many telephone calls did you make over that period long distance to Robinson? A. I don't know.

Q. Well, approximately? A. I made—from my end of it, it may run as high as a dozen, and possibly it is more from their end of it.

Q. You made, I assume, in your business numerous
101 long distance telephone calls? A. I make two or three a day now.

Q. So that at the end of the month, when your telephone bill is payable, you get a list from the telephone company

showing the date that the call was made and the city to which it was made, do you not? A. On private phone, yes.

Q. And also on the business phone? A. My phone bills now are just lumped.

Q. Sir? A. My phone bills now are just lumped on my apartment telephone.

Q. When you make a long distance call it is listed, showing the place where the telephone call is made, is it not? A. Not over the apartment telephone, no.

Q. Not over the apartment telephone? A. It goes over the switchboard and they bill me once a week for the charges.

Q. Don't you get a bill from the telephone company? A. No.

Q. You pay your telephone bill to the apartment where you live? A. To the apartment where I live, yes.

Q. How many telephone calls did you make from your office long distance?

* * * * *

102 Q. Covering the same period, February 21 to July 23. A. Possibly two or three, maybe more, one way or the other; one or two more, either way, or less.

* * * * *

103 Q. Now, getting down to the Continental engines, in one of your long distance telephone conversations with Mr. Robinson you testified that in 15 or 20 days possibly 200 Continental engines would be coming up; is that right? A. Yes.

Q. Where did you get that information that in 15 or 20 days 200 Continental engines would be coming up? Those 15 or 20 days, I assume, were before publication of the official list of the Maritime Commission? A. Possibly, yes.

Q. What was your answer? A. Possibly, yes, sir.

Q. When you said that they were coming up, what did you mean by "coming up"? A. The Maritime Commis-

sion had been notified that they would be declared surplus, but the papers had not come through to clear them which would allow the Maritime to sell them.

* * * * *

Q. From whom did you learn that the possibility of 200 Continental engines coming up for publication and sale was good? A. Mr. Clark.

Q. Mr. Clark. By the way, can you place that 104 conversation with Mr. Clark as to time? Was that in March, April? A. That was no doubt about the middle of April.

* * * * *

Q. And then in the middle of May you testified that the papers finally came through. Could you tell me what you meant by that? A. The papers declaring them surplus to the Maritime Commission had been approved and sent through.

Q. Where did these papers come from? A. The agency declaring this equipment as surplus, which happened to be the Navy.

Q. Do you call that a declaration? Is that what you call a declaration? A. Yes, sir.

Q. It is? A. It is a declaration. They declare these engines as unnecessary for their purposes.

Q. Now, when the published list first came out in reference to these Continental engines—I understand your testimony was on June 1st— A. Yes, around that.

Q. Did you say yes? A. It is in that pamphlet when it was.

Mr. Bress: June 10.

105 Mr. Dunn: June 10th. Pardon me.

The Witness: Yes, sir.

By Mr. Dunn:

Q. On July 1st, when the prices on the Continental engines were first published for the public, they were shown at \$910 wholesale per engine? A. Yes, sir.

Q. Now, did you have anything to do with the reduction of the Continental motors from \$910 to \$750 per engine?

A. That figure was set by the price board.

Q. Which figure? The \$910 figure? A. The nine hundred ten and also the seven fifty, and my suggestion or my question to the Maritime Commission, Mr. Clark and Mr. Gorman, that if these engines were taken and all of them were taken and they would be exported, would they consider a price of around \$750 for them.

Q. What did they say? A. They said they couldn't consider anything until the offer was made by my clients and a check accompanying it.

Q. Well, did Mr. Gorman or Mr. Clark have any authority to reduce the retail or wholesale price of these various marine engines without first having gone before the price board, regardless of whether a check was put up for them or not? A. Not to my knowledge.

106 Q. They had to go before the price board? A.

They did not feel at liberty to go before the price board until they had had a firm offer for them at that price.

Q. Now, there was not any objection, as far as this alleged contract was concerned, to Nolen and Robinson going down to the Maritime Commission and negotiating and concluding a deal if they saw fit, was there, on your part? A. My services were not to close any deals.

Q. Are you finished? A. Yes.

Q. Why did you become disturbed when you found out, and when you wrote in your letter of June 26, Plaintiff's Exhibit 2, that Judge Nolen was down there negotiating a deal on these engines?

Mr. Bress: He did not say he was disturbed prior to the conversation. That was written after the conversation of June 26.

By Mr. Dunn:

Q. Why did you think that something was wrong when you found out that Judge Nolen was down at the Mari-

time Commission working out a deal with possibly a half million dollars worth of engines involved? A. I had received the information over the telephone from Mr. Robinson that the Judge wanted me to make a concession for some of his expenses, and so forth, down here, in
107 the purchase of these big engines.

Q. Was it at your pleading or intercession that the price was finally reduced from \$910 to \$750 per engine before the board? A. It was upon the submission of their agreement with their check by them that induced the price board.

By the Court:

Q. As the Court understands it, your testimony is, however, that you made the suggestion to them first? A. Yes, I made the suggestion to them first, and they advised me that if they had a firm offer they may consider it.

I relayed that information to Mr. Robinson, and Mr. Robinson and Mr. Nolen arrived here and made their firm offer by letter accompanied by check.

By Mr. Dunn:

Q. Getting back to June 19, 1945, you testified that you had a telephone conversation that day with Robinson; Robinson requested to inspect these Continental engines? A. That is right.

Q. Up at Mechanicsburg, is it? A. Mechanicsburg, Pennsylvania.

Q. You went down to see Mr. Clark and asked him if he would give Robinson permission to see those engines?

A. Yes. Mr. Robinson asked if I could arrange
108 where he would be allowed to inspect.

Q. You saw Mr. Clark on July 19 or the following day? A. Right in there; either that same day or the next morning.

Q. And you told Mr. Clark that your client, Mr. Robinson, wanted to inspect these engines at Mechanicsburg? A. That is right.

Q. You say you were present when a telegram was dictated? A. He called his secretary in and dictated a telegram.

Q. Did you see that telegram sent? A. What?

Q. Was that telegram sent? A. I don't know. It was dictated. I heard it dictated. I couldn't say whether it was sent or not.

Q. Now, in your deposition of October 5, 1947, you said that the services to be rendered by you were to get information and intercede on behalf of your clients? A. That is right.

Q. Is that correct? A. Yes.

Q. Interceding with the Maritime Commission, I assume? A. Anybody that had surplus property that they were desirous of purchasing.

Q. You were to intercede with Mr. Clark and Mr. Gorman? A. Or the Navy Department or the Treasury
109 Department or anybody.

Q. As far as this particular contract is concerned, intercede with Mr. Clark and Mr. Gorman? A. Yes.

Q. What do you mean by "intercede"? A. Getting the facts, the information, the items that they requested, and anything connected with their request.

* * * * *

110 Q. Now, you testified that you got from the files of the Maritime Commission the information that Nolen and Robinson had closed this deal up without your knowledge. What files did you get that from? A. I did not testify that I got the files. I testified that Mr. Clark gave me the information from his files.

Q. Got the information from his files? A. Yes.

Q. How did you get it from his files? A. I tes-
111 tified that Mr. Clark got the information from his files and verbally gave it to me.

Q. Have you ever bought any surplus commodities at the Maritime Commission for yourself? A. Yes, sir.

Q. Did you ever go through with the contract? A. Yes, sir.

Q. On how many occasions did you make such a contract, Mr. Carroll? A. Offhand, I couldn't say absolutely, but there is possibly 12 to 15 contracts that I made with the Maritime Commission.

Q. Did you buy marine engines? A. I bought some engines from Mr. Clark—three of them, yes.

* * * * *

113 Q. You also said your office was in the Investment Building at that time. Will you state with whom you shared offices there? A. Ex-Senator Brookhart and Meyer Sawyer.

Q. You were connected with Senator Brookhart and Meyer Sawyer, the lawyer who originally filed this suit for you? A. Yes, sir.

* * * * *

George A. Viehmann

* * * * *

Direct Examination

By Mr. Bress:

Q. Mr. Viehmann, will you state your full name, please? A. George A. Viehmann.

Q. Mr. Viehmann, you are the Assistant Secretary of the Maritime Commission? A. Acting Assistant Secretary of the Maritime Commission.

Q. Pursuant to a subpoena served upon the Commission, have you brought certain records here relating to the transaction involving marine engines sold by
114 the Maritime Commission in the name of American Pacific Corporation? A. I have.

Q. Have you those records with you, sir? A. Yes, sir.

Mr. Dunn: Your Honor, I wonder if we could have a short recess and we both could look at those records at the same time?

The Court: The Court will take a ten-minute recess.
(A short recess was had.)

By Mr. Bress:

Q. Mr. Viehmann, in your position as Acting Assistant Secretary of the Commission, are these records which you have produced under your general supervision and control? A. Not immediately under mine; under the Director of the Division of Supply at the present time.

Q. Are these records, to your knowledge, records from the original files of the Maritime Commission? A. They are.

Q. Some question has arisen, Mr. Viehmann, with respect to whether or not a telegram was sent on June 19, 1945, to the officer in charge at the depot at Mechanicsburg, Pennsylvania, giving a Mr. Robinson authorization to inspect certain equipment.

I direct your attention to this folder which you have produced, and particularly to this document, and
115 ask you whether or not this document initialed in pen and ink by J. E. C. purports to be a carbon copy of a telegram sent on June 19, 1945 (handing a document to the witness). A. I presume it is.

Q. This telegram is addressed to the Supply Officer in command, Naval Supply Depot, Mechanicsburg, Pennsylvania:

"H. A. Robinson, of American Pacific Corporation, New York, desires inspect 286 Continental engines stored your depot. Will you please authorize inspection. Signed, J. E. Clark, Maritime Commission."

A. It is from the official files. I will say it is the official document, yes, sir.

Mr. Dunn: No objection.

* * * * *

Ernest W. Gorman

* * * * *

Direct Examination

By Mr. Bress:

Q. Mr. Gorman, will you state your full name, please, sir? A. Ernest W. Gorman.

Q. How are you employed, sir? A. I am Assistant Chief of the Bureau of the Reserve Fleet of the Maritime Commission.

117 Q. In February, 1945, what was your employment? A. I am Assistant Director of the Contract Settlement and Surplus Materials Division of the Maritime Commission.

Q. Is that division the division in charge of the disposition of surplus which the Maritime Commission is authorized to dispose of? A. It has since been broken up and has a different name, but at that time it was.

Q. And was that the division of which you were assistant head that had control of the disposition of surplus during the period February, 1945, to July, 1945? A. Yes, sir, it was.

Q. And were you in that particular position during the entire period February to July, 1945? A. Yes, sir, I was.

Q. When did you leave that position? A. In September, 1945, right after the Japanese surrender.

Q. Is there a Mr. J. E. Clark in your division? Was he in that division? A. He was in the division. At that time he was the sales officer in charge of selling surplus marine engines.

Q. Is it correct to state that your division was broken down in a number of suborganizations and sales offices and you had sales heads for different types of commodities that were being sold as surplus? A. That is correct.

118 Q. And the Director was your immediate superior, and you were in charge of all of them? A. That is right.

Q. Do you know Mr. Russell A. Carroll, the plaintiff in this case, who sits here on my left? A. I do.

Q. Did you participate generally, during the period February to July, 1945, in all transactions involving the sales of surplus? A. I believe I would have to explain my answer on that.

Q. Go ahead, sir. A. I did not operate on the level of negotiating with people for the sale of surplus property. The principle that I worked on was this. We tried, wherever possible, to fix a price on commodities that we had for sale, and the sales officer in charge of the particular commodity would state what he had, the possible market, the condition of the material, the fact that there would be no guarantee with it, and then try to fix a price at which the Government would gain the most from the sale and yet would be attractive to purchasers.

That came in the form of a recommendation of the price committee, of which I was the top member, and if I
119 agreed, they approved of it and the materials were advertised for sale on that basis.

Q. So that you entered the picture in the disposition of surplus first in the determination of the price at which it should be held out for sale, but that was before there were any negotiations with any particular person for the sale; is that correct? A. Generally, that was true.

Q. Who handled the actual negotiations and the transactions with respect to sales? A. Sales of engines, you mean?

Q. Sales of engines. A. Mr. John Clark.

Q. And sales of other items were under other salesmen? A. Various other salesmen.

Q. With respect to the matter of the sale of engines to particular persons, which was my prior question, with what frequency, if at all, did you participate in negotiations or deal with purchasers during the period from February to July? A. Very rarely and only to a limited degree. Certain persons desiring to buy surplus property

might insist—express a strong desire to come and talk to me. My conversations with them generally were limited to an explanation of the way we operated and as quick a referral as possible to the proper party to deal with.

120 Q. With respect to the plaintiff, Mr. Russell J. Carroll, during the period from February, 1945, to July, 1945, did you have any contact with him with respect to his interest in the purchase of marine engines for some New York people? A. Yes, I did.

Q. And can you tell us on how many occasions you personally talked with Mr. Carroll about this proposed deal? A. I could not be sure, but I believe maybe twice. It could have been more, or could possibly have been only once, but I think twice would be about right.

Q. The organization at which you sat near the top was an organization during this period which was selling surplus material running into substantial money? A. Yes, sir. With respect to the engines, we anticipated that there would be about a half billion dollars worth of small engines that the Government would have—marine engines—surplus to its needs. Actually, although I left the division long before midway of its program of disposing of these, I understand that the figure did reach close to that half billion dollars.

Q. Apart from engines, the disposition of other marine items also came under your cognizance at that time? A. Everything that the Maritime Commission was a disposal agency for, except ocean-going ships. We did not
121 handle ships.

Q. How does it happen that with all of that volume of work you remember Mr. Carroll in connection with engines for these New York people? A. Well, that goes back to your former question.

The amount of marine engines that were expected to be declared surplus were not only known in general scope to the Government itself, but to the manufacturers of Diesel and gasoline marine engines. They were very much

alarmed that this quantity of surplus engines, the majority of which were new, built for war purposes, but not yet shipped overseas—they had a great fear that the post-war market would be completely disrupted. As a matter of fact, they expected chaotic conditions if all these sales materialized and were sold here in the United States.

A conference was held, oh, I would say February or March of 1945—I may be wrong, but it is in that general time—with members of the marine engine industry, very prominent men, presidents of some of the companies were there, held here in Washington, in which the Maritime Commission agreed that we would emphasize our disposal efforts on these engines to get them out of the country to friendly nations that were in need of rehabilitation; and only in such cases where an American citizen in real need of an engine wanted one of these we would prefer
122 to sell them than for export.

In the case of a man who might need one, who would be a fisherman or someone who ran a small ferry, and if he could not get one off the production lines from the factory, we were willing to sell him one.

Q. How about other Government agencies? A. Other Government agencies, yes. They had a priority of 30 days. We could not sell to anyone until that priority was over—other Government agencies, veterans, charitable institutions, educational institutions, States, towns, and municipalities.

Q. How does your reference to the effect on the domestic disposition of the surplus bring to light this particular proposed sale of engines through Mr. Carroll to this group in New York? A. Well, we were quite sincere in our efforts to dispose of these for export wherever practical and possible, and when Mr. Carroll showed up and told me that he represented parties who were interested in export of engines to China in large quantities and assured me that his interest was bona fide and not an idle interest, I became very much interested myself.

It was somewhat different from the sale of one or two or three engines, or ten. He was talking in terms of three or four hundred engines, and it was our job to dispose of them. This seemed to fit in the ideal pattern.

Actually, these engines were consumers of gasoline, they were pretty heavy consumers, and, if you will recall back to the middle of 1945, gasoline was rationed, and even people that drove to work had to prove how many miles it was to work and back to get enough gasoline to run on them. We did not see any market at all for this type of engine. I am speaking of the Continentals, 300 or so, and, of course, being our job to dispose of them, we were quite interested in a customer who said he might be interested in three or four hundred.

Q. What was there that Mr. Carroll presented to you, apart from his oral statements to you, that indicated that his principals had very close connection with the Chiang Kai-shek Government of China? A. I believe—well, now, I don't know as my memory is too good. I was going to say I thought he said a brother-in-law or some relative of the Chiang Kai-shek family, but maybe I am mistaken on that. This was two years ago.

Q. Was the name of Mr. T. V. Soong mentioned? A. Not that I can recollect definitely.

Q. But you know there was some other Chinese official related to the Government? A. Closely related to the Government. That impressed Mr. Carroll as a customer very definitely in my mind.

Q. On the card do you recall whether or not the names of the particular individuals that Mr. Carroll stated that he represented appeared, if he did tell you the names, or don't you remember? A. I have been trying to, since I have been told that I would be subpoenaed here as a witness—I have been trying to recollect, and I cannot recollect absolutely whether or not he told me the names of his principals, but I kind of think that he did.

I would not want to say it positively, but I think he did.

Q. Now, following your first discussion with Mr. Carroll about his interest in these engines, what, if anything, did you do with respect to directing him to one of your subordinates to take up the matter over there? A. Well, I either called Mr. Clark over and introduced them or I sent Mr. Carroll over to Mr. Clark—I don't know which one, but I did not enter into the discussion of prices or terms.

Q. Did there come a time, before a transaction of sale was consummated, when you again were called in to the transaction in which Mr. Carroll was interested for the purpose of reducing the price on the Continental Commando engines? A. Yes.

Q. State what that was, sir. A. In accordance with the procedure which I described here a few moment ago, a standard price had been fixed on these
125 particular engines of—May I refer to a note I have in my pocket?

The Court: Yes.

The Witness (referring to a paper writing): \$1515 each retail sold to a user, a single user, per engine, and \$910 each when sold in quantity lots to a retailer—

By Mr. Bress:

Q. Wholesaler. A. Wholesaler or somebody who wanted to purchase a big quantity of them that would get the same type of consideration if they were built direct at the factory in normal times.

Q. Yes. A. An that price had been set and included in the advertising that went out on June 10, 1945. The price probably was set a week or so ahead of that time, because we had to have these things printed up and run off. It was known as the Surplus Property Bulletin, and I think that number of that was 19.

Q. Before you leave that, sir, I will show you number 19 and ask you whether or not this will refresh your recol-

lection as to whether or not the price had been fixed as of the publication of this bulletin, or was it fixed for the next bulletin? Here is page 9 of the number 19. Will you look at that, please, and see if that refreshes your recollection. I show you the next bulletin also (handing documents to the witness). A. I do not see these engines listed here.

Q. Continental Commando? A. On the bottom.

Q. Model 6602 marine engines, Mechanicsburg.

While you are looking at that, Mr. Gorman, also I will show you the next bulletin, July 1, in which the Continental Commandoes are listed and has the price that you just stated, \$1515 retail and \$910 wholesale.

State, from the examination of these two bulletins, whether it refreshes your recollection as to when the price was first published (handing a document to the witness). A. Well, my recollection as to when it was first published is not accurate. I took these notes from whatever file I could find when I thought when I was going to be subpoenaed, and it appeared to me from those files that it was Surplus Property Bulletin 19, but apparently the price is not included in that; so the price was established, though, prior to the date that number 20 or the next one was actually listed, because it took some time to print it up.

Q. That is, prior to July 1? A. Prior to July 1.

Q. So it was not ready as of the time that the June 10 one was printed? A. No. I see here there is 296 of them listed here, but that no price has been established.

Q. Did you serve on the price board that handed down the decision reducing the price below \$910? A. Yes. I was still on that price committee—the top man on it, you might say.

Q. That is the same committee, is it, that originally fixed the price at \$910? A. Yes, sir, that is correct.

Q. What considerations prompted the board to reduce the price to \$750? A. The consideration, as I recall it,

that prompted the board was the opportunity to sell all of these engines in one grand total for export out of the country.

By the Court:

Q. What was the reduction to, sir? A. The reduction was to \$750 each if all the engines were taken.

Q. \$750 each? A. From \$910, for the quantity purchased.

Q. Who made the suggestion as to the possible reduction? A. The suggestion when it reached me came from Mr. Clark, the sales officer, in the form of a memorandum, which was customary and which was the policy.

128 The same people that set the price came back and recommended that it be reduced to take advantage of what they considered to be a fine opportunity and a good business deal for the Government.

Q. Did you have any knowledge that Mr. Carroll had been dealing with Mr. Clark and proposed the reduction in price? A. No, sir, I did not. I believe I saw him down there, over in Clark's office, or going past my door over to it, once or twice between the presentation of this business card I referred to a short time ago and the time that this recommendation came; but what he did, if anything, to cause this reduction I could not say.

Q. Did you have any understanding as to whether or not the original presentation to you by Mr. Carroll with respect to buying all of these for export was from a source which was still interested in the same purchase at a reduced price, or did you concern yourself at all with whom the buyer was going to be? A. Not particularly. If the buyer could qualify, could get the export license which was required at that time—possibly is yet—and if he met the terms and conditions satisfactory to us, it was a matter of more or less indifference as to who he was.

Q. You do not then know to what extent Mr. Carroll dealt with Mr. Clark and what reasons, if any,
129

he submitted as to why the price ought to be reduced? A. No, I do not know about that. The next thing I heard about that was the recommendation that it be reduced, which, incidentally, I was against personally.

Q. Your board, however, voted to reduce the price, even though you personally felt it ought not to be reduced? A. No. Two members of the board, I think, felt that it should be reduced. I did not think that we had tested out all the wide market to find out whether we could get \$910 for these; and, in that connection, when arrangement was made with the party that had purchased them, agreed to purchase them, there was a stipulation in there that after the priority period of 30 days, which allowed these preference groups to come in and purchase them—the States, municipalities, and so forth, that I mentioned before—that before any engines were to be sold to this particular purchaser at a reduced price that they would be available for 12 days to all others who were quite willing to pay \$910, or, if they bought a single engine, \$1515.

Q. Does your record show, or have you checked the records to determine, whether or not the priority expired on July 22 for priority buyers? A. I did not exactly check the records. I am pretty busy in my own work, and
130 I tried to get hold—get an opportunity to look at the file, without too much success. I kept getting tied up. But the priority period in 12 days did expire before this deal became effective.

Q. Do you have in your memorandum or in your searches that you have recently made the date when the price committee ultimately approved the reduction in price to \$750? A. That was on June 23, 1945, that that agreement or understanding was reached. However, it was not effective till the purchaser came in and paid 10 per cent deposit on the total engines, which was a month later, on the 24th of July.

Q. Now, do you know that the purchaser came in a month later and made a deposit of 10 per cent on 250, I

believe, engines, totalling \$187,500 and put up 10 per cent, equal to \$18,750? A. The records that I was able to get hold of and consult shows that he did deposit \$18,750 as a 10 per cent deposit on 250 of these Continental engines.

Q. Have you checked the arithmetic to know that 250 times 750 is 187,000? A. Yes, I did. You add 0 there and you get the same thing.

Q. Did you check the records also with respect to June 23, when the price reduction was effective, and have you determined whether or not a deposit was made of
131 \$22,000 for certain Superior and Atlas engines and a receipt was issued by the Maritime Commission to Mr. Henry Robinson, of American Pacific Corporation? A. No, I did not check the record for that. I understood that my testimony here on these was what I could remember about this deal, and I have no recollection of that other deal at all, and I did not bother to go checking any records.

Q. I show you here a letter dated July 23, 1945, from Henry S. Robinson, president, American Pacific Corporation, to the attention of Mr. Clark, July 23, 1945, addressed to the Maritime Commission, in which he refers to his telephone conversation with you today "in connection with the purchase of 250 Continental marine engines, Model R6602, which are now in your surplus stock at a price of \$750 each as is, f.o.b. storage.

"Enclosed herewith is our certified check No. 256, on the Chase National Bank, to your order for \$18,750, representing 10 per cent of the purchase price of these 250 engines.

"It is our understanding that these engines will be held by you for a maximum of 120 days and that all are to be removed by this time. We will also furnish you schedule showing as nearly as possible when the engines will be removed, so that your shipping facilities will not be impeded."

132 That represents a letter in the file of your records? A. Yes.

Q. This is the original of that letter, signed by Mr. Robinson; is that correct, sir (indicating)? A. Yes, sir.

Q. I want to show you now, with respect to the other deposit, a letter dated June 23, 1945, two letters dated June 23, and two acknowledgments of the same date, with reference to the other purchases.

I show you first letter dated June 23, 1945, signed by Henry Robinson, president, American Pacific Corporation:

"We are enclosing herewith our certified check No. 224, on the Chase National Bank, to your order for \$5,800.

"This represents a 10 per cent deposit on the following merchandise:

"Three new Atlas 400 horsepower Diesel engines, located at Government warehouse in San Diego, California, at \$19,327 each, Total, \$57,981.

"It is understood that we must remove all engines within a period of 120 days.

"Will you kindly furnish us with an acknowledgment of this transaction?"

Now, I show you here acknowledgment dated June 23, purported to be signed by J. E. Clark, sales agent, Materials Disposal Section, addressed to the American
133 Pacific Corporation, to Henry S. Robinson:

"Dear Mr. Robinson:

"This will acknowledge with thanks your letter of June 23, 1945, to which you attached certified check No. 224, Chase National Bank, for \$5,800, representing a deposit of 10 per cent on the purchase of three new Atlas Imperial Diesel marine engines located at San Diego, California, at a price of \$19,327 each, total \$57,891.

"It is understood that these engines are sold as is f.o.b. conveyance point of storage and entire lot will be removed by you within a maximum of 120 days."

That is the acknowledgment, or purports to be? A. That appears to be. I have no remembrance of this case at all.

Q. With respect to the \$22,000 deposit, I show you this and ask you whether or not your file shows that Mr. Clark acknowledged receipt on June 25, 1945, from American Pacific Corporation, attention Henry S. Robinson, the following:

"This will acknowledge with thanks your letter of June 23, attaching certified check No. 223 on the Chase National Bank for \$22,000 to apply towards the purchase of the following engines:

"Twenty used Superior marine Diesel engines located at Norfolk, at \$1,500 each.

134 "Nine new Atlas marine engines, located at Lathrop, California, at a price of \$19,327 each.

"Four used Superior marine Diesel engines, located at San Diego, at \$2,000 each.

"Two new Superior marine Diesel engines, located at San Diego, at \$4,100 each. Total, \$220,143."

Is that correct, sir? A. This appears to be a letter written by Clark in just the way it would be written if he had received that money.

I would like to clarify something, if it is satisfactory to you. If the price of those engines had been set for any and all customers prior to this deal, it would not necessarily be brought to my attention who the customer was. Having been set, the terms and conditions of sale, it would be just like the tag on a suit in a department store. You would just sell it.

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135 Cross Examination

By Mr. Dunn:

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Q. Had you seen him before February, 1945? A. Oh, I saw Mr. Carroll once for two hours when he was resident plant engineer of the Richmond shipyard in California back in 1941. I believe somewhere in there.

Q. When he came in to you in February, about February 20, 1945, do you recall particularly seeing the card with the Chinese characters on the back of it? A. I have never stated here that my memory is that Mr. Carroll came around in February. As my memory serves me on this—and you will bear in mind that I have no particular reason to remember this sale above all others, the hundreds that went on—it seemed to me that it was about three or four weeks before this deal was finally made on these
136 Continental engines that Mr. Carroll showed me that card.

Q. In other words, you would say it would be some time three or four weeks prior to June 10, 1945? A. Yes. As my memory serves me, it is probably a month before that. Now, I may be wrong.

Q. At any rate, you did not see him in February, March, or April, of 1945? A. I can't remember that I did.

Q. When you saw him for the first time didn't you testify about a card with Chinese characters on the back of it that he showed you? A. Yes, that is right.

Q. Do you remember that on the front the words "American Pacific Corporation" appeared? A. Well, I have been trying to recall that, and I don't know whether he told me at that time that the people were the American Pacific Trading Company, or such, or whether he gave me their names; but there was something on the other side from the Chinese characters that were either the names of one or both of his principals or the trading company, and I thought it was the trading company; but there again, it is two and a half years ago.

Q. You do not have any recollection of the names of Nolen or Robinson being mentioned at that conversation?

A. I have tried to recall that, too, and I am more
137 inclined to believe that they were than that they were not, but I cannot be sure.

Q. You say you probably saw him once or twice. On that occasion, or on the other occasion, if you saw him a

second time, did he get any information or did he intercede on behalf of Nolen or Robinson or any other person relative to these marine engines with you? A. May I ask you what you mean by "intercede"?

Q. Well, to ask you to give certain information relative to prices of these various engines, what was coming out in the near future, any information of that type. A. Not that I can remember, and if he requested such information from me, it was at the wrong place. I could not hope to keep day-by-day information in my office of what sales agents were doing. We were selling engines each day, and all kinds of other material.

Q. You had no information to give him? A. Not at all, in my office. It was the sales agent.

Q. You referred him to Mr. Clark? A. To Mr. Clark, right.

Q. Didn't he know Mr. Clark before? Didn't he know Mr. Clark was the sales manager? A. After our first meeting he must have, because if he told me he was interested in engines, which he did, I either called Mr. Clark over or sent him over to see Mr. Clark.

138 Q. Wouldn't a person who knew his way around and had experience and background in this type of work know Mr. Clark was the person to see? A. It would not be difficult to find out. Just ask the question, "Who do I see to buy marine engines?" he would say "Go see Mr. Clark."

Q. If he had had any experience with marine engines prior to the time he discussed the matter with you, wouldn't he know Mr. Clark would be the person to see as sales manager? A. If anybody that came up there wants to see about engines, he would certainly know that, because our policy was clear-cut there.

* * * * *

By Mr. Dunn:

Q. It was Mr. Clark's duty as sales manager, as I understand it, to negotiate and consummate these deals in ac-

cordance with the published lists that were given to the public? A. If the price was fixed on there, he could go on and close that deal without any further reference to me.

Q. Mr. Carroll did not appear before the price board in an effort to reduce the price of the Continental
139 engines from \$910 to \$750, did he? A. Not to any recollection of mine. The price board was always consulted for a change in price by another memorandum, stating clearly the facts in the case. We wanted to have it on record why is it we reduce the prices, just what the situation was. Now, there were times when we reduced the prices not because somebody offered us less money; merely because we could not sell them at the price we asked.

Q. The equipment was not moving? A. And then the sales agent, no matter what reason he had, would prepare a recommendation to this price committee, and then we would consider it.

I can't recall any specific occasion where I took part in negotiations for price with a prospective purchaser—that I personally took any part in those.

Q. You have no recollection of talking with Mr. Carroll about the reduction of these particular engines? A. No, I have none.

Q. Or with Mr. Nolen or Mr. Robinson? A. No, I have none. If anybody had broached the subject to me, I would say, "Go to see Mr. Clark. This is the wrong place."

Q. Now, you have knowledge of how these published lists were sent out to possible prospective purchasers of various surplus equipment of the Maritime Commission?

A. How they were mailed out?

140 Q. How they were mailed out? A. Yes. We had a mailing list that contained the names of all parties who had written in and asked to be put on the mailing list for engines or other surplus property, and we mailed them every month, plus certain people we put on the list that did not solicit us. It was the business with us. We were trying to find customers.

Q. Do you have any knowledge whether those files contained a request by Nolen or Robinson that they be put on the mailing list? A. I have no knowledge, no, sir.

Q. In reference to these published lists, is it possible that a list is published on June 1st and that someone other than officers of the Commission would have knowledge as to what was going to be contained in those lists on, say, the middle of May? A. Yes.

Q. Who might those persons be? A. Anybody who came into our office, not mine in particular, that might go over to see Mr. Clark and ask him, "Are you going to get a certain type of engine I am looking for?" or "Are you going to get any more of the same kind you have got?"

And he was quite free to tell anybody that inquired about that, because it did not give the person that got that
 141 information any undue advantage over the rest of the public, because after the price was fixed and it appeared on this bulletin, there were 30 days in which the public could not buy the surplus anywhere, and the whole country was circularized. Everybody was told, "Here, we have so many engines," and if somebody came in and asked, "Have you got any more of these?" it was quite natural for us to say, "Yes, They are coming out on the next circular. The Navy has just turned over a hundred of them."

That question came up. It was referred to me as to whether it was proper or not to do it, and I decided that it was quite all right. You see, we had the materials to dispose of, and we were looking for customers anywhere we could get them, provided the deal was sound and reasonable.

Q. Any person could come in and get this information prior to publication? A. Any person who we thought was really interested in buying these engines.

Q. Would you have to have a license to practice before the Commission to get this information? A. The Maritime Commission issued a regulation, well, somewhere

around the first of January, 1945, stating that any parties doing business before the Commission—and it was interpreted to mean buying surplus, but from the Commission—must come and register in the Secretary's office,
 142 the Secretary of the Maritime Commission, particularly if he had been a former employee of the Commission or had worked for other Government departments that might possibly give him some advantage—presume that it might—

Q. Mr. Carroll was formerly an employee of the Commission? A. Well, at the time I mentioned before, when I met the resident plant engineer of the shipyard, he was; and so, I believe, he was the first person that showed up that had been a former employee, it seemed, right after this was issued, and we refused to talk to him or do business at all with him until he went down there and registered himself properly.

Incidentally, while that still applied, as far as I know, the length of time I stayed there to former employees of the Commission, it proved utterly impossible to work with the public in general. The fact that anybody that was interested in buying an engine—we could not talk to him until he registered—why, we received phone calls from the West Coast, Chicago, people that wanted to buy engines, and it would have been ridiculous to say, "Oh, no. We can't talk to you over the phone. You must come all the way to Washington, register here, and then go back to Chicago, look at the engine, and then we will talk business with you."

So, with the exception of former employees, that was relaxed.

143 Q. So that any person who called on the telephone, and particularly long distance, for a great distance there, would get information relative to these machines without having registered? A. Yes. We found it impossible to work otherwise.

* * * * *

144 Q. Now, you testified that, according to the file, a 10 per cent deposit was put up of \$187,500, represented by a check for \$18,750, and that also a check, a certified check, was put up in the sum of \$22,000 for Diesel engines, some 20 of them, I understand.

Now, can you show me in that file where these particular engines, and particularly the Continental engines, were actually delivered and paid for either by Nolen or Robinson or the American Pacific Corporation?

Mr. Bress: I object, if the Court please. The question is whether or not these people made the contract to buy these engines, and not whether they were ultimately delivered. This particular witness left in September, in any event.

Mr. Dunn: It is the question of the contract I am asking. He has testified that they put up a deposit, Your Honor.

The Court: He did not call it a deposit. You called it a deposit. He did not call it a deposit.

By Mr. Dunn:

Q. What did you refer to the \$18,750 as, Mr. Gorman? A. As a down payment. I believe those were
145 my words. Whether that is technically correct——

Q. Down payment——

Mr. Bress: Let him finish. Down payment on what?

The Witness: Down payment on the total number of engines, 250 engines, with the understanding that this down payment stayed there right along and only would be to cover the last number of engines that were withdrawn. Other than that, as they were withdrawn, the purchaser was to pay cash for them.

By Mr. Dunn:

Q. Did the purchaser actually pay cash for the rest of these engines?

Mr. Bress: I object to the question as to what the purchaser did after the arrangement was made to buy these engines.

The Court: Up to this time there is nothing in the evidence which would justify the assumption that the commission claimed by the plaintiff was not due when the contract was made and the down payment was made. Therefore, the Court thinks your question is irrelevant unless you can offer evidence—and when you do, it will become relevant—to the contrary.

By Mr. Dunn:

Q. Can you show by that file, Mr. Gorman, that
146 there was an actual contract entered into for the purchase of this equipment by Mr. Nolan, Mr. Robinson, or the American Pacific Corporation? A. I thumbed through—I presume these are the same papers that I had—and I did not see the contract in there; but the nearest thing to it—and from what I get my information is the terms in the letter of acknowledgment from the purchaser to the Commission, and the Commission's statement to them acknowledging receipt of their check to cover the matter that was understood. I think there was an agreement, but I don't see it in the files. Neither do I see the memorandum to the price committee fixing the price or changing the price. I don't see that in my file.

However, I have not been in this division for two and a half years, and I don't know how the files were kept, whether they were split up and certain documents kept in another file or not, and I have not got the time to go into research on this.

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147 The Court: The evidence up to this time is that the down payment clinches the contract.

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By Mr. Dunn:

Q. To your knowledge, Mr. Carroll received no information from you, nor did he intercede on behalf of Nolen or Robinson or anybody else?

Mr. Bress: I object to the question to the extent that he uses the word "intercede."

Mr. Dunn: I am using the term that your client has stated in the deposition, which will be read to the jury.

Mr. Bress: He has explained that.

Mr. Dunn: I should like to ask him again, Your Honor.

That is my case—that there was no information
148 that this man gave Carroll—no information—nor
did Carroll intercede with this man or anybody else
at the Commission, because, as far as cross examination
is concerned, he could not have. He did not have any
information to give him.

The Court: Well, you have answered your own question, have you not?

Mr. Dunn: I do not want to make speeches to the jury at this time.

The Court: Well, you are doing it very well, are you not?

The Court will let you ask that question. The Court thinks the jury can interpret the word "intercede."

By Mr. Dunn:

Q. Will you answer that question, Mr. Gorman? A. Well, I would say you answered it as good as I could—that I did not intercede for anybody, and at no time during my whole office, in that respect, did I ever intercede for anybody.

Q. You adopt my little speech? A. Well, that's it. I have got a little reputation of my own to uphold—that I did or I did not.

* * * * *

153 **John E. Clark,**

* * * * *

Direct Examination

By Mr. Dunn:

Q. Mr. Clark, will you give your full name, for the record? A. John E. Clark.

Q. Where do you live? A. St. Louis, Missouri.

Q. What is your occupation at this time? A. Dodge-Plymouth dealer, automobile dealer.

Q. You are an automobile dealer? A. Yes, sir.

Q. Do you own your own business in St. Louis? A. Yes.

Q. Were you employed with the Maritime Commission in 1945? A. I was.

Q. How long had you been employed with the Commission? A. First of September, 1944, till October 1, 1946.

Q. In what capacity did you serve with the Maritime Commission, Mr. Clark? A. Well, my contract officially called for sales specialist, but I was acting as general sales manager.

154 Q. Where was your office? A. Fourteenth and Park Road.

Q. What did your duties entail as sales manager? A. Originally it was strictly marine engines; supervise the sale of marine engines; and then afterwards the entire marine equipment.

Q. Was it strictly in marine engines between February and August, 1945? A. Yes.

Q. Do you know Mr. Carroll, the plaintiff in this case? A. I know him through business, yes.

Q. Do you recall a transaction involving the sale of a number of Continental marine engines, Atlas engines, new and used, to two gentlemen by the name of Nolen and Robinson? A. Yes, sir.

Q. Now, can you tell the Court and the jury about when you first saw Nolen and Robinson and the development that occurred thereafter? A. If I recall correctly, it was between the 1st and 15th of June. I remember that because our bulletin went out the latter part of May, and we would advertise them early in June, and they came in some time between the 1st and 15th of June, into Mr. Hunter's office, and I was called up there.

He was Director, and I was called up there——

155 Q. Mr. Hunter was Director? A. Director of

Surplus Division, Maritime. I was called up and introduced to him and told that he wanted to purchase these Continental engines, as well as other equipment, so from then on I handled the deal.

Q. You were introduced to Nolen and Robinson? A. Nolen first. Nolen came in first.

Q. Was Mr. Carroll there? A. No, he was not.

Q. When was that? A. Some time between the 1st and 15th of June, because I think we finally closed the deal about the 20th or 25th of June.

Q. Did Nolen, to your knowledge, seem to have information as to these various engines when you first talked to him? A. Yes, he did.

Q. Did he know all about them? A. Yes.

Q. Did he have a price list with him, a publication? A. He did.

Q. And on that price list were the Continental engines shown, on that list that he had? A. Yes.

Q. Was the price shown there? A. Yes, sir; \$910.

156 Q. Was the quantity shown on there? A. Yes, sir.

Q. Was the location of the engines shown on there? A. Yes.

Q. And when he first talked to you did he have that in his hand? A. He had it.

Q. Did Mr. Carroll ever tell you, between February of 1945 and June of 1945, that he represented Nolen or Robinson or the American Pacific Corporation? A. Not by name.

Q. Not by name. Did he say anything about the American Pacific Corporation? A. I don't recall by name at all. He said he represented clients in New York.

Q. He represented clients in New York. Did he say anything about his own company? A. Carroll Associates, I think he did tell me, yes. He had a company of J. Carroll or Russell Carroll Associates—something like that. It has been two years now.

Q. Did he say he was representing J. Carroll Associates in reference to these engines?

* * * * *

A. He told me that he was interested in buying engines.

157 By Mr. Dunn:

Q. Personally? A. That is right. That was my understanding—personally—and I went through the details of it as I would with individuals, what was necessary to purchase the engines, which meant a 10 per cent deposit, a minimum of 10 per cent, with a certain stipulated time to remove all of the purchase, under a penalty of forfeiture.

Q. Can you tell me—can you tell the Court and the jury—about when this discussion was that he had with you relative to these engines and clients that he represented?

A. Well, it couldn't have been much before the first of June, because they were not declared to us until the latter part of May, 1945; so it was just a short while before Mr. Nolen came in.

Q. Did Mr. Carroll see you at any time in February?

A. Possibly did, about other things. Now, I wouldn't say that he did not see me, but not on these particular engines.

Q. Did he see you in March on these particular engines?

A. We didn't have them, if my memory is correct.

Q. I am talking about Continental engines, Atlas engines, and Superior engines. A. Atlas engines we did have. We had been advertising those engines previously. The

158 Continental engines we did not have.

Q. I asked you if he talked to you, stating that he represented a client, about Atlas engines, Superior engines, in February or March of 1945. A. I don't recall that he did.

Q. Did he talk about the same type engines in April or May? A. He could not have, Mr. Dunn, because we did not have them.

Q. You did not have them? A. No.

Q. Did he talk to you about any particular kind of marine engines? A. He talked in general about everything that we sold.

Q. Everything that you sold? A. That is right.

Q. Not particularly about marine engines? A. No; it was about everything that we sold.

Q. Now, at any time whatever did Mr. Carroll say that he represented Nolen or Robinson? A. After the deal was made, yes.

Q. After the deal was made. A. By name, that was.

Q. By name. Now, do you recall when the deal
159 was made? A. When the deal was made?

Q. Yes. A. Somewheres between the 20th and 25th of June. I have been trying to think of the right date, but it is within those five days, I think.

Q. Were Carroll's visits up there after the 25th of June frequent or infrequent? A. Almost daily.

Q. What was he talking about then, after June 25th? A. Well, in addition to a sort of protest of this sale, he was talking about other things that he intended to buy. He did not get out of the picture because of Nolen and Robinson buying these engines. As a matter of fact, Mr. Carroll was still coming there when I left in October, '46.

Q. Did he ever tell you he had a contract prior to June 26 with Nolen or Robinson wherein he was to get 5 per cent of any equipment which Nolen or Robinson purchased? A. No; I don't know anything about that.

The Court: The Court does not think that what he told somebody else about his contract is material to this inquiry.

Mr. Dunn: It goes to his credibility. This man has been saying that he saw this man almost daily.

The Court: I know, but he did not say that he told him about this contract, about 5 per cent. He never testified to that, as far as my recollection is concerned.

160 Mr. Bress: The Court's recollection is quite correct.

The Court: Strike that testimony out. He did not have to go around the country telling Tom, Dick, and Harry as to whom he had contracts with.

By Mr. Dunn:

Q. Did Carroll ever talk to you at any time relative to reducing the Continental engines from \$910 to \$750? A. I don't remember that he did.

Q. Can you explain the circumstances as to how those engines were actually reduced from \$910 to \$750? A. Yes. Judge Nolen came in and said he wanted to take them all, but he told us that if he was taking them all that he should have some margin to work on. We were selling them retail or wholesale, either one of them, at \$910 each—Continental I am speaking of. The other ones we did not reduce the price. So he offered us \$750. Well, I didn't have authority to take his deal, because we had a price panel up there, a board that ruled on those things.

Q. This is Judge Nolen that offered you that? A. That is right, Judge Nolen. So I took it up with Mr. Gorman, and he didn't agree. He didn't think we should reduce the price. I did it in writing. Finally, it went up to Mr. Hunter, who was the Director of the Surplus, and we all got together and considered it would be a fair deal for the Commission if we unloaded all of them at that
161 price of \$750.

Q. Do you have personal knowledge whether Robinson and Nolen were on the mailing list of the Commission relative to the surplus property? A. I instructed them to put them on the list, and they were getting them. Whether they had this particular date, I can't say, but they were supposed to be getting them.

* * * * *

Q. During the period February 20 to July 26, did you give Mr. Carroll any information relative to these particular machines, including the Continentals? A. I could not have given him anything on the Continentals, as I said

before, until they were declared to us. The Superiors or the Atlas—that was open to everybody.

Q. When you say it was open to everybody— A. To the public.

Q. —was this information open to all the public? A. Yes, sir.

Q. Did everybody get the same information at the
162 same time? A. Except from a geographical handicap, yes. Those in California naturally did not get them as quickly as those in New York, but they were mailed out together at one time. There were no staggering dates.

Q. During the negotiation of this contract with Nolen and Robinson did you have any long distance telephone calls with either one of them? A. During the negotiation?

Q. Yes. A. Several.

Q. Several? A. With Robinson.

Q. Did you have any correspondence with them? A. I don't recall that we did until the deal was actually consummated.

Q. In this correspondence that you had with either Nolen or Robinson was the name Carroll ever mentioned? A. No.

Q. In your telephone conversations with either Nolen or Robinson was the name Carroll ever mentioned? A. No. They completely left us in the dark about Mr. Carroll until the deal was finished.

Q. What do you mean by being in the dark? A. Well, I didn't know anything about Mr. Robinson, Mr. Nolen,
and Mr. Carroll being together until the deal was
163 finished—I withdraw that. I mean by name. I knew he had a client, but I mean by name, Nolen and Robinson.

Q. Do you recall having sent a telegram to Mechanicsburg, Pennsylvania, authorizing the supply officer up there to allow Mr. Robinson to see these 286 Continental engines (handing a document to the witness)? A. Yes, sir. That is my signature on there. I did.

Q. Under what circumstances was this telegram sent? A. He called me, I think, on the phone from New York—

Q. And who is "he"? A. Mr. Robinson, and as there had been some difficulty with those engines, when they were in use by the Navy, put dangerous gunners on them, he wanted to be sure new gunners had been placed on these engines before he bought them.

Q. Was Mr. Carroll present in your room when that telegram was dictated? A. I don't know how to answer—I don't recall that he was. As I said before, he was not in the deal until it was consummated, as far as Robinson and Nolen were concerned.

* * * * *

164 Q. Mr. Robinson called you long distance and asked to be allowed to see these engines? A. I am sure that is what happened. I don't recall that he came down, because he wanted to go direct from New York to Mechanicsburg.

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Cross Examination

By Mr. Bress:

Q. Mr. Clark, who brought you here to Washington for this trial? A. The defendant.

Q. Mr. Robinson? A. Mr. Robinson's attorneys are the ones that contacted me.

Q. Your railroad expense is being paid by the defense to be brought here? A. Yes, sir.

Q. And you are being paid a certain amount a day to be here? A. My expenses are being paid.

Q. All your local hotel expenses are being paid?
165 A. Yes.

* * * * *

Q. When was the last time you saw Mr. Robinson? A. Must have been the summer of '46.

Q. Have you had any communication with him or his attorneys prior to your coming here to trial? A. In November.

Q. November of 1947? A. '47.

Q. And you made the arrangements that they would stand all the expense of bringing you here? A. I gave a deposition at that time and, naturally, when they called me and subpoenaed me I came back.

By the Court:

Q. You say they subpoenaed you from St. Louis? A. Mr. Dunn here called me on the phone. I don't know that it would be an official subpoena, Judge.

Q. I see what you mean.

By Mr. Bress:

Q. In February, 1945, to June, 1945, you were working under the general supervision of Mr. Gorman, and
166 you were assigned to the marine engine section, as far as sales are concerned? A. That is right. I was in charge of engine sales.

Q. But during the period February, March, and April—just during that period—state whether or not it is a fact that Mr. Carroll came to your office on frequent occasions to discuss the matter of Atlas and Superior engines. A. No; I don't recall that he discussed anything in particular—general sales.

Q. Did you have any discussion with him about Atlas and Superior engines? A. As I said previously, he discussed the general purchase of our general line, not always with me—seldom with me—but I had about 60 salesmen in my department altogether throughout.

Q. Was any particular subsection under you assigned to the sale of Atlas engines and others to Superior? A. No. We did divide it between gasoline, Diesel, and out-board motors.

Q. And information was available to people who came there from your various subsections? A. That is right.

Q. As far as your recollection is concerned, how many times did you see Mr. Carroll in your office between
167 February and June of 1945? A. Only a couple of

times that I can remember. Now, he may have been up there more that I did not see, because I was in my own office. He was discussing perhaps with others.

Q. But, as far as your own recollection is concerned, it might have been ten times? A. No, not in my office.

Q. You mean in your private room? A. Yes.

Q. In your private room there was Mr. Massey also, wasn't there? A. Yes.

Q. Whenever Mr. Carroll would come to see you it was very easy for Mr. Massey to see him there, was it not? A. Massey, during the whole time, was not in my office. We finally moved him outside. There was nobody but a girl there after that.

Q. During February to June? A. Well, I don't know the exact dates, but we moved our offices, as Government offices do, about every three weeks.

Q. As I understand it, you are not in a position to state during this period of months how many times Mr. Carroll came to your office? A. I can only say it was just a couple of times, if at all, and not about any particular engines.

Q. What do you mean by if at all? Do you mean
168 to imply that Mr. Carroll did not come there at all?

A. No; I said to discuss that particular thing with me. I can't say that he was not there.

Q. Apart from what he came to discuss, how many times did you see him in your office during the period February to June? A. I can't answer that definitely because there were so many people that came in, because I can't recall Mr. Carroll any different from other customers.

Q. If you had a constant stream of people coming through your office during this time, you could not remember the subject of your discussion with him? A. It couldn't have been anything but engines, because that's all I sold.

Q. You do not remember whether it was Continentals, Superiors, or Atlases? A. I do remember that I met Mr. Carroll in the outer office and he discussed other activities with me—salvage operations, and so forth.

Q. Isn't it a fact that from a very outset when Mr. Carroll discussed with you the engines he told you he represented people in New York? A. He did tell me he represented people on this particular deal, but not any names.

Q. So far as your dealings with Nolen and Robinson
169 son are concerned, in the closing of the deal you did not know that they were the New York people whom Carroll had previously represented? A. No, sir, I did not.

Q. But you say you did learn that? You were in the dark about that until after the deal was finished? A. That is right.

Q. And at that time you did learn that Nolen and Robinson were the principals for whom Mr. Carroll had been making these inquiries concerning the engines?

* * * * *

Q. You learned that after the deal was over? A. From Mr. Carroll.

Q. As a matter of fact, after the deal was closed you did not discuss the matter with Nolen or Robinson, did you? A. About Carroll?

170 Q. Yes. A. No, sir; that was none of my business.

Q. As a matter of fact, when you did learn that the New York people for whom Mr. Carroll had been getting the information over a period of months turned out to be Nolen and Robinson, with whom you had just closed the deal, you made some observation concerning your view of the morality of that deal, did you not?

* * * * *

A. After that Mr. Carroll protested to me, and I told him I was very much in sympathy with him, but under our regulations there was nothing that I could do to protect Mr. Carroll or any other buyer. I had to sell direct to anybody.

Q. But it was immediately that you learned that the deal that you had closed was the deal that Mr. Carroll had been working on, according to Mr. Carroll's then statement to you? A. Mr. Carroll told me that.

Q. You did not discuss that with Nolen and Robinson at that time? A. Well, no. They were not in town.

Q. After learning what you did about Carroll's activities and Nolen and Robinson closing the deal with you, without telling you that Carroll had been giving them the information and had this arrangement with them, did you personally characterize, in the presence of Mr. Massey at your office, what you thought about their conduct in that respect?

A. I may have mentioned that I sympathized with him in not being able—if he would not be able to collect, if he had done the work for him.

Q. Did you indicate that that was a dirty trick? A. I might still do it.

Q. With respect to the price of the Continental engines and your timing of that, I think possibly you are in error. You testified that these gentlemen, when they came to see you in June, had a bulletin listing the Continentals and the price? A. No, sir, I did not say that definitely. I said they could have had.

Q. Oh; they could have had? A. Yes, sir.

Q. As a matter of fact, it could be that as of June 23 there was no outstanding bulletin mentioning the Continentals at a price? A. Yes, there was on the 10th of June. A bulletin went out. The best figures I can get from the Maritime Commission, on the 10th of June I think they went out. I have not looked at the file. I was just given that information by the Commission.

Q. I am suggesting that you might be in error about it, and I do not know that you are willing to admit it. A. If I am, I will.

Q. You stated you closed the deal with these men on June 23. The only published release concerning these engines on June 10 did not mention any price, and the price did not get mentioned until the bulletin that was published in July. Isn't that a fact? A. Well, I may be wrong on my memory on it.

Q. With respect to the matter of the reduction in this price, what factors, to your present recollection, were considered by you in making your recommendation to the price board that the unit price on these engines be reduced to \$750? A. The overall sales expense of selling that number of engines individually as against selling them in one lot would save us selling expense and also save the handling in Mechanicsburg, if they could all move out in one lot, rather than have both the Navy personnel physically handle them and my department handle all the book records that was necessary; and then, another thing, we considered it to the advantage of the Government.

173 We knew there would be a lot more of those particular engines, and they were not accepted at that time whole by the military. So the best thing to do, according to my own opinion at that time—I recommended that the price be dropped.

Q. Is that the only factor that prompted that recommendation? A. It couldn't be anything else than that. I was only in the interest of the Government when I was doing it—nothing personal in it.

Q. Was the fact that they were gasoline consuming engines and gasoline was being rationed a factor? A. Well, yes, I guess it was, but not to the point of making any special price for Nolen and not anybody else. We give it to anybody else.

Q. I am not suggesting that a special price was made to Nolen and Robinson. I am speaking of the factors that prompted the reduction in the price to \$750. You mentioned one. Now, you agree that there is a second.

Now, isn't there a third factor, the fact that the proposal for the sale to the Nolen-Robinson group was for a sale contemplating export of these engines out of the country? Was that not also a factor in the recommendation? A. Well, they claimed that they were going to export them.

* * * * *

174 Q. It is not a fact that the price board had your recommendation for reduction in price because of this large quantity of them, a wholesale disposition, they may be difficult to dispose of because of gasoline, and it was desirable to dispose of them in one lump sum to this group because they were going to be used for export and thus not conflict with domestic sales from our own
175 engine manufacturers? Is that not a fact? A. Yes.

Q. With respect to the export feature, when did you first hear about that? A. About this particular deal for export?

Q. Yes. A. Unless it was when Nolen first came to me with it. I had not heard of it other than that, less than the time we were making our price recommendations.

Q. How many times did Nolen see you prior to closing the deal? Once or twice? A. Twice.

Q. Did he give you any information about his contemplated shipment of these overseas to China? A. He said that he was working closely with an eastern exporter.

Q. You mean a Far East government? A. Far East government, that is right.

Q. It could mean China? A. Could have meant China.

Q. May I ask you if you will think back into your recollection and tell whether or not you remember, on one of Mr. Carroll's early visits to your office, that he showed you a card containing the name of an individual on the front and on the back there was considerable printing in Chinese? A. No. I tried to think of that
176 yesterday, and he did not. The first card that I saw like that was Nolen's.

Q. But you remember seeing Mr. Nolen's card with Chinese on the back of it? A. That is right.

Q. You know there is such a card; you just do not remember whether Mr. Carroll showed it to you or Mr. Nolen? A. I know definitely Mr. Nolen showed it to me, because Mr. Nolen gave it to me from his hand.

Q. You do not know, as a matter of fact, that Mr. Carroll appeared at the Maritime Commission with such a card in February? A. No, I don't know that.

Q. And if it was shown to you, you do not remember it at all? A. If it was shown, I don't remember it. The first I saw was Mr. Nolen's.

Q. Your office while you were there sold sixty to one hundred million dollars worth of Atlas, Continental, and other marine engines to various people, did it not? A. That is right.

Q. And they were all handled in the same manner? A. Well, not the price reduction on all of them, no. There was a price settled for and it was sold. It was sold like any other marine engine company would sell them.

177 Q. The deal that was closed with Nolen and Robinson on the Continentals was at the lower price of \$750, and the deal that was closed on the Atlases and the Superiors was at the published price? A. That is right.

Q. If a person is in Washington on the scene and makes frequent visits to the Maritime Commission, he would be able to get information, frequently, several weeks in advance of the time that people in other parts of the country would get it by waiting for the printed bulletin; is that not correct? A. No. You are speaking of a possibility, not a probability.

Q. Isn't it a fact— A. I said a while ago I had about 60 salesmen. Everybody from the mail clerk up saw those declarations when they came in. My instructions were that nobody got that information until they were published. Whether or not that was possible, or whether it did happen, I could not have control over that.

Q. Don't you know it was a policy of your superior, Mr. Gorman, to make available to anybody who came to the Commission current information relating to the disposition of surplus and that if you had information you gave it and you did not withhold it until the next publication was published? A. No, sir. That was not true in my department.

178 Mr. Gorman may have done that, but in my department it was not.

Q. According to your testimony, if any person appeared in June, 1945, to find out the price of a Continental engine, he would not be told what that price was, because it was not published until July? A. Not until the board had passed on it and it was published.

Q. And if it was not published until July he would not be told the price until July? A. It would not be fair to the other people if we had done it. Now, it may have been done. I don't say it was not done by somebody in the department, but it was not according to regulations.

Q. Isn't that, as a matter of fact, exactly what you did in this case? Your bulletin did not publish the price until July, but you gave Nolen and Robinson the \$750 price in June? A. We gave others the same opportunity.

Q. But that was not a published price in the bulletin at that time? That is my point. A. No, not at that time, but we could always change our prices.

Q. Only by the price board? A. That is right.

Q. And the reduction in this price was by the price
179 board, on the basis of the considerations which were presented, as we have discussed here now? A. With the distinct understanding that he would not get any of the engines for 42 days, giving others an equal opportunity to buy them at that price.

* * * * *

180 Q. You said that when Mr. Nolen and Mr. Robinson appeared in your office in June they had all the information as to the names of the engines, the locations,
181 the prices, and so forth. Do you know where they got that information from?

* * * * *

A. No, I don't know.

* * * * *

Redirect Examination

By Mr. Dunn:

* * * * *

Q. Now, Mr. Clark, prior to the publication of these price lists or the lists containing the surplus marine engines, did you at any time give any information to Mr. Carroll?

A. My answer is, according to my recollection, no, I did not give it to anybody.

Q. Who, by the way, is Mr. Massey? A. He was my sales clerk.

Q. He was your sales clerk? A. Yes.

Q. You said, in answer to one of Mr. Bress' questions, that you may have said something about it was a dirty trick that Nolen and Robinson played on him. A. I don't think I used that expression. I said he had my sympathy.

Q. He had your sympathy? A. If he had a deal with them. I did not know that he did.

Q. You stated, to the best of your recollection, that he, Carroll, had your sympathy if he had a deal with them?

A. That is correct. I never saw any contract or anything like that.

* * * * *

Q. Did Mr. Carroll have any other deals, personal deals, involving purchases on his own behalf of any other marine engines?

* * * * *

183 The Witness: There was no deal closed with Mr. Carroll on anything during that period that I recall. I think that after that there possibly was.

By Mr. Dunn:

Q. Now, you testified that Mr. Carroll was in your office frequently after July 26, 1945. Can you state what, in your opinion, with you and with the other members of your staff Mr. Carroll's reputation as a business man was?

Mr. Bress: I object.

The Court: Objection sustained.

Mr. Dunn: Now, Your Honor, we have this situation where there was in evidence a newspaper clipping of Mr. Carroll as a construction engineer. I have no right of examination of the person who wrote that article. I do not know who wrote it. I do not know whether it is true or whether it is false, and neither does this jury. I think, under the circumstances, a man who observed Mr. Carroll over a long period of time in reference to something that he is before the Court on today has a right to state what he thought, in his mind, and with the reputation among his staff, of Mr. Carroll as a business man.

The Court: The reason the testimony of the plaintiff as to his background was admitted, including the newspaper article, was that anyone who comes into court, 184 either as a plaintiff or a defendant, has a right to show facts which indicate he is not just a fly-by-night, an adventurer. He has a right to show he has a standing. Every litigant is accorded that privilege, provided, of course, it is not carried to extremes. That is what the Court permitted.

Now, to allow this witness to state what he thinks, from what his clerks told him, of this plaintiff, would not be either legal evidence or fair in this case, and the Court sustains the objection.

Mr. Dunn: All right. I will ask the witness this question.

By Mr. Dunn:

Q. You observed Mr. Carroll on a number of occasions and you talked with him a number of times about various equipment on the——

The Court: Just a minute. The Court would like to state another reason, and a more important reason. The plaintiff's testimony, which is uncontradicted up to this time, shows actual rascality on the part of Robinson and Nolen, and neither Robinson nor Nolen has seen fit to come to this courtroom to defend himself.

Mr. Dunn: I take exception to that.

The Court: And that is another reason why the Court does not think you should be permitted to introduce
185 the testimony you desire to.

Mr. Dunn: I object to that last statement you made.

The Court: All right, sir. It is all right to object to it, but that is the uncontradicted situation.

* * * * *

Mr. Bress: If the Court please, I move for a directed verdict for the plaintiff.

The Court: I will hear from the defendant, if he desires to be heard. I think, if there is any discussion, it ought to be out of the presence of the jury.

(The jury left the courtroom.)

Mr. Dunn: Your Honor, I assume the directed verdict is directed at the proposition that we have no rebuttal evidence to the making of the contract itself.

The Court: You have no conflict yet. You have no evidence at all.

Mr. Dunn: Of course we have evidence, Your Honor.

The Court: Where?

186 Mr. Dunn: Mr. Gorman has rebutted practically everything that Mr. Carroll has said. Mr. Clark has rebutted practically everything that Mr. Carroll has said.

Now, Mr. Carroll's contract, as I understand it, was this: "I was to get information. I was to relay it to you, to Robinson and to Nolen."

Now, assuming that the contract was made, the evidence here shows that Mr. Carroll did not do anything in reference to getting information to Nolen and Robinson, because he never talked to Gorman relative to these engines. He only talked to Carroll in a general sort of way. He never got any information.

Gorman testified this way:

"I did not first see Carroll in reference to this transaction until two or three weeks prior to the time that the

deal was consummated," which would have been no earlier than May of 1945.

Carroll has got himself going over to the Maritime Commission on the very next day after he had seen Nolen and Robinson in the hotel room. Gorman says that he did not get there until May. That is three or four months later.

It is not a question of whether the contract was made. We have got to assume that. I have no evidence in rebuttal of that. But it is a question of whether Carroll performed the contract, Your Honor. That is the question before the Court, and that is the question which
187 the jury has a right to determine.

He has not performed his contract. Their own witnesses, Gorman and Clark, have testified there was no contract. The jury has a right to deliberate as to whether there was a contract. There has been an inference raised here that no contract was made.

The Court: Are you through?

Mr. Dunn: Yes, sir.

The Court: The Court has never directed a verdict for the plaintiff. I think probably I did in one case, but it is extremely unusual for the Court to direct a verdict for the plaintiff. In Maryland it is never done.

Now, in this case, the plaintiff's testimony, uncontradicted, shows that the defendants desired to purchase various surplus material from the Maritime Commission and that they did not possess the technique of getting information. They just did not know how to do it. So through a man named Light, I think, they employed this plaintiff, who, according to the undisputed testimony, knew how to get about in the Maritime Commission and how to get information; and anyone who is not an infant knows that if you know how to do it, you can get information of the character which the defendants desired to get.

They employed this man, unquestionably, and, according to the undisputed testimony, he gave them
188 the information that he was employed to get. The

fact that they undertook to go over his head and, without his knowledge, consummate the deal not only does not relieve them from liability but shows that they are morally corrupt.

The undisputed testimony is that they admitted their liability on two occasions. There is some testimony from the plaintiff that defendant Robinson told him, "Now, we owe you 5 per cent, but Judge Nolen"—this man Nolen, who calls himself a Judge, and who could have gotten the Chinese characters from any Chinese laundry in Washington or New York for 50 cents, I suppose, to put on the back of his card to show that he was cooperating with Chiang Kai-shek—"thinks that in view of the fact that he made several trips to Washington, you ought to knock some of that off."

"Well, I won't knock any of it off."

"All right. We owe it to you."

Now, when these deals were consummated, according to the undisputed testimony, this defendant Robinson and this man Nolen were at the Roosevelt Hotel. The plaintiff called him up at least a half dozen times during the day about his money, and he was told, "Well, call up at a certain time when Mr. Nolen will be here, and we will see you. We will make an appointment with you." That continued

until they made an appointment with him at 3 o'clock, 189 and when he got there at 3 o'clock, they had both checked out at a quarter of three and left him sitting, and from that time on he did not hear a word from them until some time later when, accidentally, he met Robinson in Washington, and Robinson gave as an excuse that Nolen said he had to leave town. He gave no reason as to why, when they got to New York, they did not send him a letter or telegram and tell him that they would send him this money.

There is not only no defense in the case, but there is absolute rascality shown. This defendant Robinson does not appear here. He is a defendant in the case, and he

knows he is being sued, and he does not appear here. Nolen evaded service and, according to what counsel for the plaintiff told me this morning at the bench, he is in Massachusetts, and up to today he has refused to have his deposition taken, and he offered today to have his deposition taken, and the Court refused to have the case delayed until that is done.

It seems to me that for the Court to refuse to direct a verdict in this case would indicate that the Court was morally lax and did not appreciate rascality when it was plain to him and when it could not be misinterpreted.

Of course, the Court realizes that very often after people get services rendered for them and get what they want they forget the services rendered. The Court understands that. There is no excuse for it. Nobody
190 with any proper conception of his social responsibility or of the fact that active business is based on confidence would be guilty of such conduct.

I do not want to raise my voice. I got through making speeches years ago. I thought I did. But that is the situation as this Court sees it.

The Court is going to direct a verdict. Get the amount, and give me your views about the interest.

Mr. Bress: The amount is \$20,162.50, the interest to run from date of judgment.

The Court: The jury has nothing to do with that.

Mr. Bress: No; we are not demanding that they return it.

The Court: Under the Maryland statute, interest is in the discretion of the jury in a case of this kind.

Mr. Dunn: Your Honor, I have an exception?

The Court: Yes, you have an exception.

Let the jury return.

(The jury returned to the courtroom.)

DIRECTED VERDICT ON BEHALF OF THE PLAINTIFF.

The Court: Ladies and gentlemen, the uncontradicted testimony in this case is that the plaintiff was employed by the defendant Robinson and another to perform the services which you have heard about. The undisputed testimony is that he performed those services. The
 191 undisputed testimony is that the defendant Robinson, admitting his liability, has evaded payment.

It is the duty of the Court to instruct you to find for the plaintiff in the sum of \$20,162.50.

The Deputy Clerk: Jurors, please rise.

Members of the jury, by direction of the Court, your verdict is that you find for the plaintiff in the sum of \$20,162.50, and that is your verdict, so say you each and all.

(The jury indicated in the affirmative.)

* * * * *

192 **Plaintiff's Exhibit No. 2.**

RUSSELL J. CARROLL

One Thousand Investment Building

Washington 5, D. C.

National 2404

June 27, 1945

American Pacific Corporation,
 120 Broadway,
 New York 5, New York.
 Attention: Mr. Henry Robinson,
 President.

Dear Henry:

As per our telephone conversation of yesterday, I checked up with the Maritime Commission and was assured that the deal for 250 Continental Commando Engines which I submitted to you several weeks ago can be completed as agreed. Your order, with deposit of \$50,000.00

calls for 250 of these engines at \$750.00 each and if no other Govenmental Agency takes over these Continental Commando Engines by July 22nd, our deal can be completed.

The Superior and Atlas engines will be delivered to you on schedule. However, in your phone conversation yesterday, you informed me that you thought you did not owe me our agreed fee of 5% on the big engines purchased.

It was my understanding, however, in my conversation with you and your associate, Judge James R. Nolen, that my fee was acceptable and agreed to, to apply on whatever you purchased from the Maritime Commission.

193 In a later phone conversation, you advised me that you were unable to locate me by phone and called Mr. Clark of the Maritime Commission direct. You further advised me not to worry that any transaction had with this Division, whether you talked to me or talked direct with them, I would be protected as per our agreement.

After this phone conversation, I advised Mr. Clark of the Maritime Commission that you were my client and that I would appreciate them giving you any information you might desire, as there were times when you needed information immediately and possibly could not contact me by phone. This I understand from Mr. Clark he has carried through.

Naturally when I had not heard from you and found out that your associate, Judge James R. Nolen was here working with the Maritime on the sale of possibly a half million dollars worth of engines, I could not help but think that something was wrong, or that the Judge did not understand all the phone conversations and correspondence we had with each other. However, in our telephone conversation yesterday, you advised you had informed the Judge that I had submitted these engines to you and that I would have to be taken care of as per our agreement.

With further reference to our phone conversation of last evening wherein you requested me to send you the data and pictures of the Scout cars for sale. I have today contacted the Agency and am enclosing herewith listings of the different locations where these cars are stored. The cars we talked about and which would be the most convenient lot to draw from are the cars stored at the Lordstown Ordinance Depot, Warren, Ohio. A sale was held there on June 5 and 6th which I attended. There are approximately 900 of these cars available at this location and during the sale these cars brought an average of approximately \$450.00 each.

You have not advised me the exact number you are interested in. I will, however, advise you that these cars are all numbered and have been given an OPA ceiling price. These prices average in the neighborhood of \$1500 per unit and before we purchase any more of these units from this lot, it will be necessary for either you, Judge Nolen or myself, or some automobile man, to inspect each individual unit and then we can purchase by number and select the best cars. None of these cars are very old and some of them have mileage of less than 146 miles. However, they have been sitting in the open, with no care, for over a year and as you know, the color of paint the Army uses on their equipment does not stand up too good in the sun and today, these cars do not look any too presentable. However, when an experienced man checks them, he will be able to take cars with the best of tires and equipment and with low mileage.

Another item is the armor plate on these cars, which can be removed very readily. In fact, two men have removed all armor plate from a car in a little less than three hours. When the armor plate is removed and the canvass top comes off at the same time, you lose all the appearance of the drab paint and have a very nice looking chassis.

While at the sale, some friends of mine bought 80 of these cars, which cost them an average of \$450.00 and they

probably had an expense of \$50.00 per unit to get the cars into their garage at Cleveland. They informed me a few days ago that they have stripped a few of the cars and have already sold one for \$1000.00 net to them, which is practically 100% profit on one unit in a very few days. While we can buy these cars for less than \$500.00, you should figure that these units will cost approximately \$500.00 each as there will be expense in changing tires, towing, getting engines started which have stood for approximately a year and other incidentals, and in order to protect these out-lays, I think you should figure around \$500.00 per unit as the initial cost.

In our conversation of last evening, you stated you would be in Washington and would see me this coming week. Upon your arrival here, I will go over each of the units with you and show you the ceiling price placed thereon by the OPA.

196 Recently I was advised that one of the Government agencies has for sale 2600 ice boxes. These cabinets are a portable refrigeration unit with storage capacity of approximately 29 cubic feet. I am enclosing herewith the data on them and also a picture and I thought some of your clients may be in the market for just this type of box. These units can be sold f. o. b. Texas for approximately \$32.00 each.

Kindest personal regards,

Very truly yours,

(Signed) RUSSELL J. CARROLL
RUSSELL J. CARROLL

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Excerpt from Proceedings.

* * * * *

The Court: What is the situation with respect to this case?

Mr. Bress: I rest now.

Mr. Dunn: I have this situation. As you understand, I do not have any client present before the Court. Robinson is not here. Now, for the past two or two and a half months Mr. O'Donoghue, in our office, has been trying to get in touch with Robinson. When this case was ready for trial in 1947, two or three times, before present counsel was in this case, a man by the name of Sawyer was appearing for the plaintiff. Robinson was available. We were ready to go to trial, and we could have at that time taken Judge Nolen's deposition. Now we are faced with the situation where we have not got Robinson. We do not know where he is. We are trying to do the best we can for him. Mr. O'Donoghue talked to—Your Honor, I do not feel well. Can we stop for a couple of minutes?

The Court: Surely. Sit down.

(After a brief recess the following occurred at the bench:)

Mr. Dunn: I was saying that Mr. O'Donoghue talked to Judge Nolen last night, and Nolen now says that he
152 will consent to having his deposition taken. Nolen is in Boston. We had talked to Nolen prior to this time and we had asked him to come down here to the trial. He said he would not do it voluntarily.

Now, I think, under the circumstances, we are perfectly willing to pay counsel's expense to go to Boston over the week-end and take Nolen's deposition.

As far as my case is concerned, we will finish it today, and it will only be a question of reading the deposition to the jury Monday morning.

We do not like to do this. We do not like to ask for it, but I think, as agent for Robinson, whether he is here or not, we ought to ask the Court to do it.

The Court: It is all right for you to ask the Court to do it, and it is all right for the Court to refuse it.

• Mr. Dunn: Yes, sir. We have asked the Court. Do you refuse it?

The Court: I certainly do. Have you any testimony at all?

Mr. Dunn: Yes, sir.

• • • • •

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 9881

HENRY S. ROBINSON, *Appellant*,

v.

RUSSELL J. CARROLL, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

United States Court of Appeals

*for the District of Columbia
Circuit*

FILED NOV 22 1948

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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 9881.

HENRY S. ROBINSON, *Appellant*,

v.

RUSSELL J. CARROLL, *Appellee*.

Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR APPELLEE.

Introductory Statement.

This is an appeal by the defendant below from a judgment of the United States District Court for the District of Columbia, entered upon a verdict directed in favor of the plaintiff, appellee here. Plaintiff sued on an oral agreement under which he was to obtain information for the defendant about government surplus property. The defendant did

not appear at the trial. The single witness called in his behalf did not disprove any element of plaintiff's case. On the basis of the uncontradicted evidence, the trial court directed a verdict for the plaintiff for \$20,162.50, the amount sought in the complaint.

All references in this brief, unless otherwise indicated, are to the Joint Appendix and are indicated thus: "Jt. App."

Counter-Statement of the Case.

On the evening of February 20, 1945, Russell J. Carroll was introduced to Henry S. Robinson and James Nolen (Jt. App. 11, 12). Nolen claimed to be a "judge" (Jt. App. 15, 54), and a friend of Chiang Kai-Shek (Jt. App. 12, 13). He said he represented Chinese interests (Jt. App. 13) and gave Carroll his card with Chinese characters on the reverse side (Jt. App. 13) as evidence of it. Robinson and Nolen said they were interested in purchasing government surplus automobiles, scout cars, landing craft, and marine engines for export to China (Jt. App. 12, 13). They asked Carroll to get them information (Jt. App. 13), that is, to keep them informed as to what items were being sold at various government disposal agencies, where the material was located, when the items in which they were interested would be available, the sales prices, and whether they could purchase at wholesale or reduced prices if they purchased large quantities for export (Jt. App. 13, 42). Carroll was not to make any deals for them (Jt. App. 26, 38, 57), nor was he given any authority to purchase (Jt. App. 50); the "whole agreement was to keep them advised" (Jt. App. 26, 42) and get them information (Jt. App. 38).

Robinson and Nolen agreed to pay him, for such services, a fee equal to five (5%) percent of the price of material they purchased or "contracted to purchase" (Jt. App. 13, 14, 15, 53). They were to pay him personally (Jt. App. 15, 53, 54) whether the material was purchased in their own names or in the name of a corporation to be formed for

that purpose (Jt. App. 14, 15, 54). Since they had come to him "so highly recommended" (Jt. App. 15, 53) and Nolen told him "all about his connections" (Jt. App. 15, 54), Carroll did not ask for a written contract (Jt. App. 15, 54) and was satisfied with a verbal agreement (Jt. App. 15, 54). He did not feel he "would be more fully protected if (he) had a contract in writing (because) if their word was not any good, their paper would not have been any good" (Jt. App. 54).

Carroll began performance of his contract on the next day (Jt. App. 15). He went to the Maritime Commission (Jt. App. 15), learned that certain engines were available and more would be available in the near future, and relayed this information to Robinson and Nolen (Jt. App. 18). Thereafter, he visited the Commission at least twice a week (Jt. App. 19), and sometimes more frequently (Jt. App. 51, 85). He talked to several men there, including Mr. Gorman, Assistant Director of Contract Settlement and Surplus Materials Division of Maritime Commission, Mr. Clark, Sales Officer in charge of engines, and his assistant Mr. Massey (Jt. App. 16, 43). He spoke to Gorman at least twice (Jt. App. 47, 64), and to Clark 8 or 12 times (Jt. App. 47, 51). Several times a week he forwarded to Robinson any information in which Robinson was interested (Jt. App. 18, 19, 25, 49), by telephone calls from his apartment or his office (Jt. App. 19, 54, 55), or by short pencil notes, if he could not reach them on the telephone after office hours (Jt. App. 21, 22).

Among the items in which Robinson and Nolen were particularly interested and about which Carroll kept them informed were engines which were being sold by the Maritime Commission, including Atlas, Superiors and Continentals (Jt. App. 18, 19, 25). When Carroll learned from Clark that the Navy Department was about to declare surplus several hundred Continental engines and would turn them over to the Maritime Commission for disposal (Jt. App. 21, 22, 23), he advised Robinson who became very much

interested and asked him to find out how many would be available (Jt. App. 23). In May, Carroll learned that the declarations on Continentals had reached the Maritime Commission (Jt. App. 24). They were listed, without prices, in a Maritime sales bulletin, "Surplus Property List" No. 19, published on June 10, 1945 (Jt. App. 27, 68). Carroll then obtained permission, through Clark, to have Robinson inspect the engines at the Naval Depot where they were stored (Jt. App. 27, 28, 61). After the inspection, Robinson told Carroll he was satisfied with the engines (Jt. App. 28).

Carroll later learned that these engines would be offered for sale at \$1515 retail and \$910 wholesale (Jt. App. 28, 29). He went to see Gorman (Jt. App. 24) showed him Nolen's card with the Chinese writing (Jt. App. 24), and inquired whether the engines could be obtained at a lower price if the entire lot were purchased for export to China (Jt. App. 24, 25). Gorman became very much interested in the proposal (Jt. App. 65) since it was an ideal solution (Jt. App. 66) to a disposal problem with which the Commission and the marine engine industry were then wrestling (Jt. App. 65); and sent him over to see Clark (Jt. App. 67). Carroll discussed with Clark the proposal to purchase the Continentals if the price could be reduced to \$750, pointing out that his clients would purchase the entire lot, would be exporting them to China, an ally, and that because of gasoline rationing it would be hard to sell these Continentals in this country (Jt. App. 27). He was told the Commission might look favorably upon the proposal but could not officially consider it until a definite offer was made, accompanied by a certified check for ten per cent of the purchase price (Jt. App. 26, 57).

Carroll passed this information on to Robinson (Jt. App. 26), and he and Nolen promptly came to the Maritime Commission (Jt. App. 26), spoke to Clark and formally offered to buy all the 250 Continental engines at \$750 each (Jt. App. 86). Clark submitted the proposal to the "Price Board"

(Jt. App. 29, 30, 68) of which Gorman was "the top man" (Jt. App. 68), and the Committee voted to approve the reduction provided a ten per cent deposit was made (Jt. App. 29, 70, 86). The sale could not be consummated, however, for a period of 30 days until other government agencies had an opportunity to exercise their priority (Jt. App. 32, 70). However, on the same day, June 23, 1945, Robinson did make a contract with the Commission (in behalf of his company, the American Pacific Corporation), to purchase three new Atlases at \$19,327 each, 20 used Superiors at \$1,500, 9 new Atlases at \$19,327, 4 used Superiors at \$2,000, and 2 new Superiors at \$4,100. He delivered to Clark two checks, one in the sum of \$5,800 and one for \$22,000 as ten (10%) per cent deposits on these items (Jt. App. 72, 73). These were the other engines about which Carroll had been obtaining information for Robinson (Jt. App. 25).

Carroll had no objection to Nolen and Robinson concluding the deal themselves at the Commission on the information he had developed for them because his "services were not to close any deals" (Jt. App. 57). In fact, on June 26, 1945, Carroll telephoned to Robinson to express pleasure that the first transaction had been consummated. He said also that he would look forward to receiving his fee since his duties were fully performed (Jt. App. 30). Robinson said that Nolen thought there ought to be a reduction in his fee with regard to the larger engines but would talk to Nolen about it. There was, however, no objection to the fee on the Continentals (Jt. App. 30, 31). Robinson said not to worry about the fact that the purchase was made in the name of American Pacific Corporation since the "judge and I own all the stock in it . . . We are personally responsible as we agreed in February with you" (Jt. App. 31).

The next day Carroll wrote Robinson a letter by registered mail (Jt. App. 31, plaintiff's exhibit No. 2, Jt. App. 103) saying that he had checked with the Commission and that if no government agency took the Continentals by July 22, the end of the priority period, "our deal can be

completed" at that time (Jt. App. 32), and explaining again that he was entitled to his full fee. On July 23, at the expiration of the priority period, Robinson and Nolen came to the Commission again (Jt. App. 32), purchased 250 of the Continentals at \$750 each and paid a ten per cent deposit of \$18,750 (Jt. App. 71). That same day Carroll telephoned to Robinson at his hotel to ask for his fee. He was put off two or three times but finally was told to call at 3:00 p.m. (Jt. App. 33). When he telephoned at 3:00 p.m. he found that they had checked out of the hotel a few minutes after their last telephone conversation with him (Jt. App. 34). When Carroll met Robinson accidentally at the Commission 20 to 30 days later, Robinson agreed that they owed Carroll his fee but that Nolen was putting up the money and since they had made the payments on the engines, they were short of funds (Jt. App. 34, 35). Having received no payment, Carroll filed suit (Jt. App. 35), seeking in his complaint a judgment for \$20,162.50, or five (5%) percent of the total purchase price of the items which Robinson and Nolen had contracted to purchase from the Commission (Jt. App. 2, 3).

At the trial neither Robinson nor Nolen were present, Nolen refusing to come although requested to do so by defendant's counsel (Jt. App. 107). The only witness called for the defendant was Clark. At the close of the case, plaintiff's counsel moved for a directed verdict for the plaintiff. The trial judge pointed out that the defendant had "no evidence at all" (Jt. App. 99), that "the plaintiff's testimony, uncontradicted shows . . . they employed this plaintiff . . . and according to the undisputed testimony, he gave them the information that he was employed to get . . . The undisputed testimony is that they admitted their liability on two occasions," and that there was "no defense in the case" (Jt. App. 100, 101). The court thereupon directed the jury to find for the plaintiff.

SUMMARY OF ARGUMENT.

The making of the agreement between Carroll and Robinson and Nolen was admitted, and plaintiff's performance was established by uncontradicted testimony. On the basis of uncontroverted evidence which proved plaintiff's case, the direction of a verdict for the plaintiff was required.

The contract was not unenforceable as offensive to public policy, although the compensation was contingent, since it was merely an agreement to obtain and furnish information about the availability of surplus property. There was absolutely no proof that corrupt or sinister methods were contemplated or employed in performing the contract.

Although the Maritime Commission reduced its price on the engines sold to Robinson and Nolen for reasons suggested by Carroll, the action was in complete harmony with the objectives of the Surplus Property Act and was not prejudicial to the public interest.

There is absolutely no proof that Carroll's contract was a broker's agreement, or that he was unauthorized to appear before the Maritime Commission. The court was not prejudiced against the defendant because of his absence but was required to direct a verdict because of the absence of any conflict in the testimony sufficient to warrant submission of the case to the jury.

ARGUMENT.

I.

It Was the Trial Court's Duty to Direct a Verdict for the Plaintiff Since the Uncontradicted Evidence Proved That the Defendant Employed the Plaintiff, That the Plaintiff Performed the Contract and Was Not Paid.

The making of a contract was admitted.

At the conclusion of the trial there was no question then in the mind of defendant's counsel "of whether the contract was made" (Jt. App. 100). He readily conceded that

"we have got to assume that. I have no evidence in rebuttal of that" (Jt. App. 100). "We have no rebuttal evidence to the making of the contract itself" (Jt. App. 99). Now, upon brief, it is argued that these "two intelligent businessmen" would not have entered into such a contract, and that the testimony of other witnesses do not corroborate Carroll's testimony. However, no testimony was offered at the trial to disprove the plaintiff's detailed narrative of the making of the contract (Jt. App. 11-15), and Robinson and Nolen voluntarily absented themselves rather than avail themselves of the privilege of confrontation (Jt. App. 107). It may be presumed that had they been present in court their own testimony would have been unfavorable to their cause.

It is also contended in the brief that the testimony of Gorman and Clark show Carroll did not perform his contract. Since only Robinson and Nolen knew what services they had asked Carroll to render and what information he actually did furnish to them, his performance could not be disproved by the testimony of Gorman or Clark or anyone except themselves. In any event, it is inaccurate to assert that Gorman and Clark "completely refuted any testimony of the plaintiff that plaintiff obtained any information from these officers of the Maritime Commission" (App. brief, 9), or that "Gorman had no recollection that plaintiff had identified his clients" (App. brief, 10).

On the contrary, Gorman testified that he personally talked with Carroll about marine engines at least twice (Jt. App. 64), that "when Mr. Carroll showed up and told me that he represented parties who were interested in export of engines to China in large quantities" he became very much interested (Jt. App. 65), that his office was especially interested in disposing of the Continentals (Jt. App. 66), that Carroll was impressed very definitely in his mind (Jt. App. 66), that to the best of his recollection when Carroll showed him the Chinese card he did tell him that Nolen and Robinson were the names of the people he represented (Jt. App. 67, 74).

Even Clark, the defendant's own witness, testified that Carroll had visited his office frequently (Jt. App. 85, 89, 90), was interested in engines, including Atlases (Jt. App. 84), had told him he represented New York clients (Jt. App. 83, 91), that he "was working closely with an eastern exporter" (Jt. App. 94), that Carroll was there before Nolen came (Jt. App. 84), that Carroll discussed all the items Clark sold (Jt. App. 85), that he told Carroll the details about purchases and deposits (Jt. App. 84), that Nolen and Robinson came to see him in June and seemed to have all the information about these marine engines, including the Continentals (Jt. App. 83), that Nolen's card had Chinese writing on the back (Jt. App. 94), that the price of the Continentals was reduced by the price board (Jt. App. 86). The factors which influenced the board to reduce the price, as recited by Clark (Jt. App. 93, 94), were the same as those which Carroll had presented (Jt. App. 25, 27, 57). Clark admitted that promptly after he closed the deal with Robinson and Nolen he learned from Carroll that these were the people Carroll represented (Jt. App. 85, 87, 91, 92) and he sympathized with Carroll in not being able to collect for his services (Jt. App. 92).

Therefore, far from disproving plaintiff's contract or his performance these witnesses corroborated unequivocally plaintiff's testimony that he was down at the Commission in behalf of Robinson and Nolen, with Nolen's card, obtaining details, talking about exporting engines to China, discussing the very engines which they actually purchased, and suggesting reasons why the price should be reduced. The only solace defendant can derive from the testimony of Clark and Gorman is that they did not know the details of plaintiff's contract or what else he was doing in its fulfillment, in addition to talking to them. But, as the trial court observed, "he did not have to go around the country telling every Tom, Dick and Harry as to whom he had contracts with" (Jt. App. 86).

Furthermore, it must be remembered that the plaintiff was not employed to get information *from Clark and Gorman*, but to get information about surplus property from *any source* available, including agencies other than the Maritime Commission. These witnesses did not and could not refute plaintiff's testimony that he did obtain information in which the defendant was interested and that he forwarded it to him. For example, they could not contradict Carroll's testimony that he informed Robinson about the scout cars being sold by the Treasury Department (Jt. App. 20), that he went, at Robinson's request, to inspect the vehicles at Lordstown Ordnance Depot, near Cleveland, and at Cincinnati (Jt. App. 20, 21, 51), that he obtained prices and submitted offers on them as requested by Robinson (Jt. App. 20, 21), and that he wrote Robinson at some length about these scout cars and about ice boxes (plaintiff's exhibit #2, at Jt. App. 105). Clark himself pointed out that he had about 60 men in his department (Jt. App. 89) and that Carroll "was discussing perhaps (these engines) with others" (Jt. App. 90). In other words, even as to the engines in question, for all that Clark or Gorman knew Carroll may have obtained some data at the Commission from other employees.

For the defendant to attempt to avoid his liability to Carroll by relying on the testimony of Clark to disprove his contract and Carroll's performance is as ineffective as the technique of the culprit in the anecdote who, faced with the testimony of one witness who *saw* the accused *taking* a chicken from a neighbor's coop offered the testimony of three other witnesses who *did not see him* taking the bird!

Telephone bills were immaterial.

Grasping for straws, defendant attempts in his brief to disprove plaintiff's performance of the contract by referring to his failure to produce at the trial bills for his long distance telephone calls to the defendant. The unavail-

ability of such bills is wholly immaterial and inconsequential because (1) the plaintiff was required by the contract to bear his own expenses (Jt. App. 13) and there was no need during performance to keep a record of his disbursements; (2) most of the calls were made from his hotel apartment (Jt. App. 54) so that he received no bills from the telephone company (Jt. App. 55) and he was not furnished by the hotel with an itemization of the calls made; (3) the office from which he made a few of the calls was one he shared with other persons (Jt. App. 60) and no separate bill was received for his calls; (4) if telephone bills had been maintained by the plaintiff they would have shown only dates and places and not the persons whom he called and since he conducted much of his business by long distance telephone (Jt. App. 54) such a list would not identify the calls made to the defendant; and (5) when he tried to obtain telephone bills for this period he was told by the telephone company they were no longer available (Jt. App. 22).

A directed verdict was required.

Since the defendant did not even attempt to refute either the making of the contract or his failure to pay the promised fee, and the evidence adduced by him did not disprove plaintiff's performance, there was nothing for the jury to decide. "It would be an idle proceeding to submit the evidence to the jury when they could justly find only in one way" *North Pennsylvania Ry. Co. v. Commercial National Bank of Chicago*, 123 U. S. 727, 31 L. ed. 287 (affirmance of a directed verdict for plaintiff).

Although generally speaking the credibility of witnesses is for the jury, "many decisions of the Supreme Court establish that in every case it is the duty of the Judge to direct a verdict in favor of one of the parties where the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a

different finding. *Baltimore & Ohio Ry. Co. v. Groeger*, 266 U. S. 521, 69 L. ed. 419.

Even if defendant's meager evidence be viewed most favorably for the defendant and it be given the benefit of all possible inferences it would nevertheless be inadequate for submission to the jury. Adding inferences to negative testimony may yield a scintilla of evidence, but such a quantum of proof does not qualify for admission into the jury room. As the Supreme Court said, in the leading case dealing with directed verdicts, *Gunning v. Cooley*, 281 U. S. 90, 74 L. ed. 720,

"A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Cases cited) . . .

"Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." (Cases cited).

Accord:

Brady v. Southern Ry. Co., 320 U. S. 476, 88 L. ed. 239.

Delaware, Lackawanna & Western Ry. Co. v. Converse, 139 U. S. 469, 35 L. ed. 213.

Galloway v. United States, 319 U. S. 372, 87 L. ed. 1458.

This court has many times affirmed the right of the trial judge to direct a verdict when, as here, evidence is lacking upon which a jury could properly find a verdict for the other party.

Jackson v. Capital Transit Co., 69 App. D. C. 147, 99 F. (2d) 380.

Speirs v. D. C., 66 App. D. C. 194, 85 F. (2d) 693.

Fleming v. Fisk, 66 App. D. C. 350, 87 F. (2d) 747.
Schwartzman v. Lloyd, 65 App. D. C. 216, 82 F. (2d)
822.

Since the evidence here so overwhelmingly established plaintiff's case without refutation on any material issue, it was the trial court's duty to direct a verdict in plaintiff's favor.

Nothing for the jury to decide even as to the nature of the contract.

In his brief appellant argues that the trial court should have submitted at least one question to the jury, namely whether Carroll's contract contemplated that use of personal influence which offends public policy, or whether it was an agreement to develop information about surplus property. Cases are cited in which the court submitted to a jury the question as to whether or not the contract contemplated the use of legal or illegal means.

However, here not even a scintilla of evidence was produced at the trial in behalf of the defendant to show that this contract called for, or was performed by, the use of political influence or subterranean methods or other unfair or offensive conduct. There was absolutely no evidence upon which the jury could properly reach a decision that the contract involved corruption or unfair dealings. It would have been an "idle proceeding" to submit this particular issue to the jury when they could find only in one way. If on the evidence adduced the jury had found against the plaintiff on this one question, had it been submitted to them, the court would have been bound to set it aside and find for the plaintiff notwithstanding that verdict. It was therefore appropriate for the court to direct a verdict on the entire case rather than leave this question to the jury.

II.

An Agreement to Obtain Information About the Availability of Government Surplus Property for a Fee Which is Computed on the Basis of Defendant's Purchases is Not Void as Against Public Policy.

At the trial the plaintiff explained many times the nature of his contract with the defendant. On direct examination he testified that his job was only to obtain information about government surplus and to tell the defendant about it (Jt. App. 13), to hunt up equipment, obtain prices and keep them advised (Jt. App. 26). He "had no authority to make any deals for them" (Jt. App. 26). On cross examination he again explained that he "was to get them information on equipment which was for sale which they wanted" (Jt. App. 38), "to furnish them with any information I could secure on items that they were interested in" (Jt. App. 42). He repeated that he had no authority to close deals for them (Jt. App. 26, 57).

The defendant had no proof that the agreement was any other kind of a contract than that described by the plaintiff. Consequently the contract under review is not a "lobbying agreement", or a contract to obtain "favor" legislation, or an agreement to procure a government contract by corrupt means. It is nothing more than an employment contract under which plaintiff was to obtain information for the defendant about the availability, location and price of government surplus property. There is no statute, rule, precedent, or reason for branding such a contract unenforceable.

True it is that Carroll's compensation was to be computed on the basis of the amount the defendant contracted to purchase (Jt. App. 13) and was therefore contingent upon defendant's decision to use the information. But that fact does not stigmatize the contract as a pariah. Even if Carroll's contract had been an agreement to procure government contracts for Robinson, and payment was con-

tingent upon success in doing so, the contract would not have been illegal or unenforceable.

A. Not all contingent fee contracts are void.

The passage in Williston's text on "Contracts" which is cited in appellant's brief, page 17, goes on in the very next sentence to comment about the Supreme Court's decision in *Tool Co. v. Norris*, 2 Wall. (69 U.S.) 45, and to say:

"But the same court later somewhat modified its previous sweeping statements, and *it is probable that most courts would agree with the argument in a New York decision: 'An agreement to compensate an agent for his successful efforts in traffic with the government has been held binding where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts', Swift v. Aspell & Co., 40 Misc. 453, 82 N.Y.S. 659*". (Italics supplied).

The footnote in the appendix to Sec. 1729A states:

"An agreement providing for compensation upon a contingent basis to procure a public contract is not rendered void as against public policy by the contingent character of the promise of payment alone". Williston, *Contracts*, Vol. VI, Rev. Ed. 1938, Sec. 1729A, Appendix page 13.

In the compendium of cases dealing with this topic in 46 A.L.R. 196, the annotator states on page 203,

"The more generally accepted view, and, it is submitted, the correct one, is that a contract of employment in which compensation is contingent upon success in securing contracts, concessions, etc., from the government through its officers, is not on its face void because of the character of the compensation".

Accord: 12 *Am. Jur.* 711, *Contracts*, Sec. 207.

These statements are in agreement with leading decisions by the Supreme Court. For example, in the case of *Oscan-yan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 26 L.

ed. 539, the Supreme Court distinguished the *Norris* case, and stated (page 275):

“So too, with reference to furnishing the government with arms or supplies of any kind. It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interest of the country. And for such services compensation may be had as for similar services with private parties, either upon a quantum meruit or, where a sale is effected, by the ordinary brokerage commission. And here it may be observed in answer to some authorities cited that the percentage allowed by the established customs of commission merchants and brokers though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business”.

See also, *Steele v. Drummond*, 275 U. S. 199, 72 L. ed. 238, *Muschany v. United States*, 324 U. S. 49, 89 L. ed. 744, and *Valdes v. Larrinaga*, 233 U. S. 705, 58 L. ed. 1163.

Furthermore it is significant to note in passing that the government itself in its own regulations relating to surplus property disposals recognizes affirmatively the propriety of paying contingent fees to persons handling surplus property. *Maritime Rules and Regulations Sec. 203.3, 203.8 U. S. Code Congressional Service, 78th Congress, 2nd Session, 1944.*

Appellant's cases are not persuasive.

The cases relied upon by the defendant in support of his contention that all contracts in which compensation is contingent are unenforceable are not persuasive here. The old case of *Tool Company v. Norris*, 2 Wall. (69 U.S.) 45, 17 L.

ed. 868 (1865) was not a contract to obtain information as here, but was an agreement to pay the plaintiff a contingent fee for procuring for the defendant a contract with the government, and the use of pernicious political influence by the claimant under the contract was actually proved. Even if the facts were similar enough to warrant application of the principle for which the *Norris* case is usually cited, it must be remembered that the Supreme Court itself has recognized in later decisions that the language it used in the *Norris* case was much too broad. In its later decisions the Court narrowed the sweeping proposition there announced and it upheld the validity of contracts which would have been stricken down had the *Norris* rule been considered as "good law".

Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261, 273, 26 L. ed. 539.

Steele v. Drummond, 275 U. S. 199, 206, 72 L. ed. 238.

Muschany v. United States, 324 U. S. 49, 89 L. ed. 744.

Nutt v. Knut, 200 U. S. 12, 50 L. ed. 348.

McGowan v. Parish, 237 U. S. 285, 59 L. ed. 955.

The case of *Hazelton v. Sheckels*, 202 U. S. 71, 50 L. ed. 939, is clearly distinguishable on its facts from the instant case, not only because it involved a contract to secure "favor" legislation on a contingent basis and because the plaintiff's conduct led to Congress paying almost \$14,400 for a parcel of land for which the plaintiff was paying only \$9,000, but also because the Court found that "In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations . . ." Here no such conclusion about Carroll's agreement is warranted on the facts elicited at the trial.

The case of *Gesellschaft Fur Drathlose v. Brown*, 64 App. D. C. 357, 78 F. (2d) 410, is utterly unlike the one at bar since it involved an attorney, previously employed by the Alien Property Custodian, who agreed for a contingent fee to do everything necessary for a foreign corporation to

enforce its rights against the Custodian and the United States with respect to property seized while plaintiff had been an attorney with the Custodian. Although in the opinion this Court discussed the general principles relating to the invalidity of contracts for the procurement of "favor" legislation (as it interpreted the contract to be), it based its decision, at least in part, upon the following theory:

"Plaintiff's claim for attorney's fees is void and unenforceable since it is in conflict with the well established rule of public policy that where an attorney has acted for a client, he cannot thereafter assume a position hostile to the client concerning the same matter, or use against the client knowledge or information obtained from him while the relationship existed."

Obviously such a case has no bearing here.

In *American Seating Co. v. Zell*, 322 U. S. 709, 88 L. ed. 1552, only three justices cited the *Norris* case, while four others felt the contract involved was barred by the parol evidence rule and the remaining two justices dissented.

In *Noonan v. Gilbert*, 63 App. D. C. 30, 68 F. (2d) 775, the contract dealt with efforts to obtain special legislation, not services relating to a government sales contract. In the passage cited in appellant's brief this Court recognized that a contract for services in dealing with government officials is perfectly lawful if it does not contemplate the use of improper means. The opinion was written by Mr. Justice Robb who wrote also the opinion in *Hanger v. Fitzsimmons*, 50 App. D. C. 384, 273 Fed. 348. This latter case involved a contract for the employment of the plaintiff to sell to the Russian Government artificial limbs manufactured by the defendant. His compensation was dependent upon his securing a contract or a loan from the Government of Russia for orders from any source in the Russian Empire. In affirming a judgment for the plaintiff for breach of contract, this Court did not even cite the *Norris* case and explained:

"We think counsel have misconceived the scope of *Oscanyan v. (Winchester Repeating) Arms Co.*, 103

U. S. 261, 26 L. Ed. 539, cited by them. There an attempt was made, by an official of a foreign government, to recover upon a contract for the personal influence of that official with another official of his government. The court characterized that contract as corrupt in its origin and tendencies. Here, however, the contract on its face is legitimate and free from all taint or suspicion, for it simply provides for the services of an agent, and the evidence is in harmony with the terms of the contract. Certainly there was nothing sinister in agreeing to represent a corporation in the sale of artificial limbs, and the alternative proposition as to securing a loan was to be in furtherance of the same design. The only influence contemplated by the contract was the proper influence of a salesman."

Corruption must be proved.

The Achilles heel therefore of an agreement to assist in obtaining a public contract is not the contingent nature of the compensation; such an agreement is vulnerable under the more liberal decisions only if the contract is one in which sinister or corrupt pressure is contemplated or is brought to bear on public officials in its performance. According to this view, to strike down a contract there must be a showing of the contemplated or actual use of improper influence.

"In other words, the law only strikes down those contracts which contemplate the use of secret, sinister influences—those which contemplate that the support of the desired measure shall be secured as a favor from the legislator induced by personal reasons or friendship, rather than by an appeal to the judgment."

46 ALR 196; see also Page 201

Accord:

148 ALR at 769.

Restatement of the Law of Contracts, Sec. 563.

In *Hall v. Anderson*, 18 Wash. (2d) 625, 140 Pac. (2d) 266, an attorney was retained on a contingent fee basis to persuade the War Department to award a contract to the defendant for the construction of a government hospital.

Although the government contract contained a provision against contingent fees, the court held the contract was not void. In a discussion of most of the leading cases on the topic the court expressed the views that the *Norris* decision was no longer the law in view of more recent Supreme Court decisions, that the better view is that the question of illegality of a contract in each case must be determined from all the elements and "then deciding whether its inherent tendency is to invite or promote the use of sinister or corrupt means to accomplish the end . . ." and that "The court will not, by mere implication, find that the simple contract pleaded contemplated the use of unlawful means."

Likewise, the Supreme Judicial Court of Massachusetts in *Noble v. Mead-Morrison Mfg. Co.*, 237 Mass. 5, 129 N. E. 669, upheld the validity of a contingent fee contract for the sale of ammunition to the British government in a well written decision which distinguishes the *Norris* case and expresses the view that only contracts which bear a "badge of fraud" must be stricken down.

In the case of *Coyne v. Superior Incinerator Co.*, 80 F. (2d) 844 (C. C. A. 2, 1936) the Circuit Court had before it a contract to pay the plaintiff 20% of the purchase price of incinerators sold by him to the city of Cincinnati. The plaintiff had been hired because he was personally acquainted with the city officials. After reviewing the leading authorities, including the *Norris* case, the Court brushed aside the suggestions of improper influence, stated that detriment to the public interest should not be presumed, and reversed a judgment for the defendant, holding:

"The prevailing rule to be gathered from the above cases is that contingent agreements to endeavor to make sales to a governmental body *are not offensive to public policy because of the mere possibility that sinister or corrupt influences may be used in the performance. There must be proof that something contrary to good morals was contemplated or done.*" (Italics supplied)

The most recent decision by this court dealing with the topic here involved is *Silverman v. Osborne Register Co.*, 81 App. D. C. 163, 155 F. (2d) 879 (1946), a case involving a button distributor who discussed tokens with the OPA and then arranged to have a manufacturer submit a bid to the government which included 15% additional for his services. Although in affirming a summary judgment for the defendant in Silverman's suit for breach of contract this court referred to the "underlying principle of the Tool Co. case" it is apparent that it was influenced by the facts that Silverman was only a "middle man", who "took a handsome profit" for his services, that "Silverman was eased out of the deal" eventually and that the defendant itself procured the contract, and that the effect of the agreement was to increase the government's cost by 15%. Probably only after weighing all the elements involved did the court rule against the plaintiff and not merely because the agreement in suit was a contingent fee contract to procure a government contract. Since the decision cited the *Oscanyan* and the *Hanger* cases this court recognized them as "good law".

In any event the facts in the case at bar are radically different from those in the *Silverman* case. Here we have "a simple contract" to procure information, not an agreement to procure a government contract. Most important, the payment of a contingent fee to Carroll did not have the effect of increasing the cost or the detriment to the government since Robinson's contract was one of *purchase* not of *sale*. Carroll's fee would be higher only if Robinson paid the government a higher price. The *more* money the government received for its surplus the higher Carroll's fee.

In other words, there is absent here that major circumstance which impressed the trial court and this court in the *Silverman* case, namely that "the tendency of such an agreement . . . was to have the government pay . . . more than it would presumably have paid under the circumstances". Here as in *Muschany v. United States*, 324 U. S.

49, 89 L. ed. 744 "We have a contingent fee of an entirely different type . . . Tendentious fraud does not exist in such a contingent contract." As the Supreme Court upheld the contingent fee contract in that case, this court should sustain Carroll's contract here.

After all, as the Supreme Court stated, in *Steele v. Drummond*, 275 U. S. 199, 205, 72 L. ed. 238:

"And it is a matter of great public concern that freedom of contract be not lightly interfered with. . . . The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. . . . *It is only in clear cases that contracts will be held void.* The principle must be cautiously applied to guard against confusion and injustice. . . . *Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated.*" (Italics supplied)

Counsel for the appellant admits that "contracts which contemplate no more than the presentation of arguments or legitimate persuasion in inducing the sale to the government or from the government are not forbidden, even when based on contingent compensation" and he concedes that only "contracts based on contingent compensation which by their nature or terms contemplate personal solicitation or the use of personal influence offend public policy and are held unenforceable in the courts." (App. Brief, 22, 23.) He then attempts to prove that Carroll employed improper means but utterly fails to do so.

B. There was no proof that sinister or improper influences were contemplated or employed by Carroll.

Several statements made in appellant's brief about Carroll's testimony are wholly unjustified and unsupported by the record, including these: "This testimony in and of itself showed that improper means were to be used and

were used by Carroll in his efforts to obtain a sale of war surplus materials to the defendants. . . . Carroll's testimony shows that he was to use improper means and influence on government officials in securing a contract, and that he secured "favours" from Government heads(!) . . . Carroll testified that he secured favors from Government officials." (App. Brief, 20.) In the words of Marc Antony, "If it were so, it was a grievous fault, and grievously (would Carroll have) answered it." But—not a single reference to the record is offered in support of any of these statements. None can be given, for the statements are wholly inaccurate! Although several phrases are set forth in quotation marks *they are not quoted from this record.*

Actually the testimony at the trial was almost diametrically opposed to these statements. Carroll testified that he was to procure only information, not contracts (Jt. App. 26), that he was not to consummate deals (Jt. App. 26); he readily admitted that information about maritime surplus was available to thousands of other people (Jt. App. 42, 43) and that information he obtained would "have been available to the general public if they had gone and requested it" (Jt. App. 44, 45); and that it was possible for others to ascertain whether items published in a bulletin were still available (Jt. App. 50). Certainly there is nothing improper or corrupt about obtaining such information.

The particular value of his services was that by visiting the Maritime Commission Carroll could with complete propriety ascertain, prior to actual publication of lists, that certain items would be declared surplus (Jt. App. 23), that he obtained the information before the people on the mailing lists did since publication and mailing took time (Jt. App. 43) and that he could learn whether the items listed were still available or disposed of by the time the bulletins were received (Jt. App. 45, 46, 49, 50). Mr. Gorman, head of the division, confirmed the fact that anybody who came to the Commission could ascertain in advance what would be contained in later lists, or what was still available and

that it was "Quite all right" to give out such information to anyone who came for it because the Commission was "looking for customers" (Jt. App. 77)! Furthermore he stated that he had never interceded for anybody during his term of office (Jt. App. 81). Since he had only seen Carroll before 1945 for only two hours (Jt. App. 73), it is extremely doubtful that this would motivate him to do any special favors for Carroll.

Counsel for the appellant emphasizes in his argument, as he repeated during his questioning of Carroll, that Carroll "interceded" with the Maritime Commission. He insinuates that there was something reprehensible about this and that Carroll has made some confession by the use of that word. Carroll explained, however, that when he used the word "intercede" he meant merely "getting the facts, the information that they requested" (Jt. App. 59). At the trial, counsel himself gave Mr. Gorman practically the same definition of the term (Jt. App. 75). When asked what he meant by it, he said "to ask you to give certain information relative to the prices of these various engines". Furthermore, at the trial appellant's counsel contended that Carroll *did not intercede* with Gorman or anybody else at the Commission (Jt. App. 81) and his whole examination of Clark and Gorman was designed to minimize Carroll's efforts in obtaining information from them or in securing results.

Consequently, the assertions in the appellant's brief about improper means and influence being contemplated or employed by Carroll find no support anywhere except in the imagination of appellant's counsel and in his desire to misbrand this contract and thus attempt to outlaw it. The record is barren of any suggestion that Carroll intended or employed improper means in obtaining information or assisting Robinson. No voice was heard to say that favors were contemplated, sought or obtained, or that sinister influence played a role.

III.

Even if Carroll's Agreement Were One to Procure a Government Contract It Related to an Agreement to Buy Surplus Property, Not a Contract to Sell Supplies. Completely Different Considerations Are Involved.

It is clear that we are concerned here with a contract only to obtain and furnish information. If it were more, an agreement to negotiate for, or actually to procure a government contract based upon that information, it would be a contract to purchase from the government wartime equipment, surplus to its needs, which it desired to get rid of, and not a contract to sell supplies to the government. This distinction is extremely significant.

Normally, in its procurement the government is interested primarily in price. A contingent fee contract to sell supplies to the government tends to increase the cost and if for no other reason is pro tanto prejudicial to the public interest. However, in contracting for the disposal of surplus property, many considerations other than cost properly motivate the property disposal officers. See, for example, the twenty (20) objectives which Congress stated were to be followed in the disposal of surplus property enumerated in Sec. 3 of the Surplus Property Act of 1944 (Chapter 479—Public Law 457, 78th Congress). Obtaining a "fair value" is the very last objective enumerated in the statute. More important as a matter of public policy are other considerations, such as "effective use for war purposes", "developing foreign markets", "avoid dislocations of domestic economy", and "prompt disposal".

Therefore in deciding to lower the price on the Continental engines the Price Board at the Maritime Commission was carrying out Congressional instructions. It was furthering the public welfare and not doing Carroll any special favor. Since the engines were heavy gasoline consumers, and gasoline was rationed, and China was an ally, and the sale of the engines at home would completely dis-

rupt American industry (Jt. App. 64, 65), selling the engines to Robinson and Nolen at a reduced price as suggested by Carroll was in complete harmony with the objectives listed in the Surplus Property Act.

In other words, paraphrasing the Supreme Court's statement in the *Oscanyan* case, it was perfectly legitimate for Carroll to lay before Gorman and Clark information regarding the quantities of motors the defendant desired, the price he could afford to pay, and the end use to which the motors would be put, the difficulty of selling in America, and thus "enable the Government officials to act for the best interest of the country". Carroll's efforts affirmatively assisted government officials to adhere to the strict rule of the *Norris* case that "considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government."

IV.

There is No Proof in the Record of the Contentions Made in Appellant's Brief That Carroll Had a Broker's Contract or That He Was Unauthorized to Appear Before the Maritime Commission.

Again and again, for several pages of testimony, counsel for the defendant endeavored to force plaintiff to say that he was acting as a broker for the defendants (Jt. App. 37, 38, 39, 40, 41), despite plaintiff's replies that he was not representing them in that capacity (Jt. App. 38). The court finally had to stop this line of questioning by pointing out twice that the plaintiff had already testified he was not acting as a broker in this transaction (Jt. App. 40, 41).

Having utterly failed at the trial to *prove* that Carroll was acting as a broker, counsel now *assumes* in his brief that Carroll was. (Point VI, page 28.) He then argues that Carroll did not prove, as a broker must, that he was the procuring cause of the purchase by Robinson and that

it was a question of fact for the jury to decide whether "the sale was actually closed out by Nolen and Robinson themselves." Since plaintiff has never proceeded on the theory that he was a broker and in fact denied that he was representing the defendant in that capacity, and affirmatively testified that he "had no authority to close any deals" (Jt. App. 38), point VI in appellant's brief is irrelevant and calls for no refutation.

However, it may be of assistance to the Court to point out that "Surplus Bulletin #20" of June 20, 1945, the first page of which is set forth in full on Page 29 of appellant's brief was not introduced into evidence or marked as an exhibit at the trial, and that the documents which were referred to in the testimony of Carroll, Gorman and Clark were two others, designated as "Surplus Property List No. 19", dated June 10, 1945 (Jt. App. 27, 68, 92) and "United States Maritime Surplus Letter" dated July 1, 1945 (Jt. App. 28, 68, 92).

Likewise in his argument that Carroll was not authorized to practice before the Maritime Commission, defendant has gone outside the record and relies upon matters utterly extraneous to any evidence introduced at the trial in making contentions bordering on the ridiculous. For example, the brief states:

"Counsel for the defendant can state to the Court that checking with the Maritime Commission Secretary's office, Mr. Carroll has never been admitted to practice before the Maritime Commission. Since Mr. Carroll has never been admitted to practice before the Maritime Commission, it can be flatly stated that Mr. Carroll's application for admission to practice was rejected by the Commission" (App. Brief, 31) . . . Records of the Commission show that Mr. Carroll has never been admitted to practice and accordingly his application for admission to practice was rejected." (App. Brief, 33.)

The defendant has never hitherto asserted this argument as a possible defense to the plaintiff's claim, and he offered

absolutely no evidence at the trial to refute Carroll's right to obtain information from the Maritime Commission. On the other hand, the only evidence on this point was given by Carroll himself who unequivocally stated that he had an authorization to appear before the Commission (Jt. App. 16), that it was in effect during the period of his dealings with the Commission relating to the engines involved in this suit (Jt. App. 17) and that it was never revoked (Jt. App. 17). The "license" itself was read into the record and appears in full at Page 17 of the Joint Appendix.

Aside from the impropriety of submitting to this Court matter which was not presented at the trial and does not appear in the record, counsel's deductions from his own *ex parte* evidence are unfounded and his argument fallacious. Even if it be assumed that action on Carroll's application was not completed and he was never given blanket authority to practice generally before the Commission, the undisputed fact is that he filed an application to practice and was authorized to discuss matters involving surplus material. The written "license" he obtained from the Secretary of the Commission so states. (Exhibit #1, Jt. App. 17.) It was not necessary for Carroll to file a copy of his employment contract, as asserted by the appellant (page 33), because the Regulation Sec. 203.7 cited by him on page 32 refers only to attorneys. If Carroll was required to give an affidavit in accordance with any Maritime Regulation (App. Brief, 35) we must assume that either he did so, or that the necessity was waived, because in fact he was given the written authorization which was read into the record.

Nor would Carroll's previous employment on the West Coast as a construction engineer disqualify him from practice in Washington before the Maritime Commission as to surplus property matters, for two reasons: (1) There was no evidence offered that while building shipyards *prior to 1942* Carroll "gave personal consideration to" or "gained any knowledge of" marine engines being declared surplus

in 1945; therefore he did not violate Sec. 203.9(a), of the Regulations. (Cited as 203.8(a) in App. Brief 34.) (2) Since he left the Maritime Commission in "the Spring of 1942" (Jt. App. 10) and did not make his contract with Robinson and Nolen until February, 1945 he was not representing anyone "within two years after the termination of his service with the Commission", and consequently was not violating Sec. 203.9(b).

Finally, counsel appears to have overlooked the testimony which he himself elicited from Mr. Gorman, who was at the time in question Assistant Director of the Contract Settlement and Surplus Materials Division of the Maritime Commission. Gorman testified that the regulations relating to practice before the Commission "proved utterly impossible to work with the public in general" except as to former employees and had to be relaxed in actual practice (Jt. App. 77, 78). As we have seen, Carroll had left the Commission over 2 years previously, and the matter of surplus engines in 1945 could not possibly have been one which was pending or as to which he gained knowledge when he was working on the coast. Therefore he was not a "former employee" within the meaning of the regulation. The unworkability of the regulation, and its disregard by the Commission as explained by Gorman, may also explain why further action was not taken on Carroll's application, if in fact action was not completed. In any event, it indicates why compliance therewith cannot possibly be a condition precedent to Carroll's cause of action against Robinson.

V.

There is No Evidence to Support the Accusation That the Trial Court Was Prejudiced by Defendant's Failure to Appear at the Trial or by Newspaper Photographs Submitted to Show Plaintiff's Background.

Counsel for Robinson flatly asserts that the trial court "was prejudiced against the defendant because of non-appearance of both defendants at the trial", that the court

"was disturbed because neither defendant had appeared to defend the case", (App. Brief, 16) and that the court felt that their absence showed a complete lack of defense (App. Brief, 15). He assumes that the newspaper story of plaintiff's background tended to prejudice the court (App. Brief, 15). Further, he admonishes that the court should not have assumed that the defendant's absence created an inference of liability (App. Brief, 16). There is no evidence in support of any of these accusations against the learned trial judge.

Upon conclusion of counsel's argument at the end of the trial, the court explained why he was going to direct a verdict for the plaintiff (Jt. App. 100-2). He pointed out that the evidence showed that there was no defense in the case and that "there is absolute rascality shown". Since this observation follows immediately after his recital of the facts as to how Robinson and ~~Nolen~~ sneaked out of their hotel after making an appointment to see ~~Robinson~~, the court's comment meant that the *testimony* had *shown* that Robinson was guilty of rascality in his dealings with Carroll. This conclusion is confirmed by the court's statement earlier in the trial that "the *plaintiff's testimony*, which is uncontradicted up to this time, *shows actual rascality* on the part of Robinson and Nolen" (Jt. App. 98).

The rascality was their treatment of Carroll after he had rendered the services they wanted (Jt. App. 102) and not their nonappearance at the trial. The judge's only other comment with reference to the nonappearance of Robinson and Nolen followed counsel's request to interrupt the trial so Nolen's deposition could be taken in Boston; he observed merely: "It is all right for you to ask the Court to do it and it is all right for the Court to refuse it" (Jt. App. 108). If the Judge "was disturbed because neither defendant had appeared to defend the case" that would have been the occasion when he would have manifested his prejudice or his assumption "that the defendants' absence created an inference of liability". But no such prejudice or assump-

tion was revealed. The direction of the verdict was based on defendants' lack of evidence (Jt. App. 99) and the uncontradicted testimony in proof of plaintiffs case (Jt. App. 100, 101, 103).

The newspaper clippings.

At the conclusion of Carroll's testimony-in-chief there was introduced into evidence three clippings, from the Oakland, California Tribune, dated September 5, 1941, Nov. 26, 1941 and Jan. 6, 1942 (Exhibits 3, 4, and 5). The first clipping contained pictures of the shipyard at Richmond, California and of Carroll, the plant engineer, and a story about how a mudflat was now 85% complete as a shipyard; the second had pictures of the shipyard after 8 months construction and of Carroll, the resident engineer, and a story about the construction of the yard and prefabrication of ships; the third contained Carroll's picture and a story about his resignation.

These clippings were offered to show Carroll's marine engineering experience and what he had built (Jt. App. 36). The third one however tended also to corroborate Carroll's testimony as to when he terminated his service with the Maritime Commission, a fact which is material in connection with the discussion in Point IV above, about his right to practice before the Commission. The clipping photographs were passed among the jury (Jt. App. 36) but not read by them or the Court. The Court explained that he was merely according to Carroll the privilege, extended to all litigants, of showing his background, his standing, his responsibility (Jt. App. 36, 98). If the case had been submitted to the jury undoubtedly the court would have properly instructed them as to what consideration they could give to the clippings. Inasmuch as the case was not left with them obviously no such instructions were necessary.

Certainly there is no basis for assuming that the trial judge was so prejudiced by them as to be thereby led to

direct a verdict for the plaintiff (App. Brief, 15). The court based his decision to direct a verdict, not on these newspaper photographs, but on the uncontradicted evidence in support of all elements of plaintiff's case (Jt. App. 100, 101, 103).

CONCLUSION.

In view of the uncontradicted evidence which overwhelmingly established plaintiff's right of recovery, the direction of the verdict was proper and the judgment thereon should be affirmed.

Respectfully submitted,

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